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(The Supreme Court.)

I] JANUARY [1958

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT : N. H. BHAGWATI, S. K. DAS AND J. L. KAPUR, JJ.

Commissioner of Income-tax, Madhya Pradesh and Bhopal .. *Appellant**

v.

Shrimati Sodra Devi .. *Respondent*

AND

Shrimati Damayanti Sahni, partner of Messrs. Ishwar Das Sahni & Bros. .. *Appellant†*

v.

Commissioner of Income-tax .. *Respondent.*

Income-tax Act (XI of 1922), *section* 16 (3) (a) (ii)—"*Individual*"—*If includes also a female—Shares in a partnership of minor sons—If to be included in the income of female assessee.*

By the Majority of the Court : (*S. K. Das, J.*, holding *contra*).—The words "any individual" and "such individual" occurring in section 16 (3) and section 16 (3) (*a*) of the Income-tax Act are restricted in their connotation to mean only the male of the species, and do not include the female of the species, even though by a disjunctive reading of the expression " the wife " or "a minor child" of "such individual " in section 16 (3) (*a*) and the expression "by such individual far the benefit of his wife or a minor child or both" in section 16 (3) (*b*) it may be possible in the particular instances of the mothers being connected with the minor children to include the mothers also within the connotation of these words. Such inclusion which involves different interpretations of the words "any individual " or "such individual" in the different contexts could never have been intended by the Legislature and would in any event involve the addition of the words "as the case may be" which addition is not normally permissible in the interpretation of a statute.

Commissioner of Income-tax, M. P. and Bhopal v. *Smt. Sodra Devi,* (1955) 27 I.T.R. 9, approved and affirmed.

Shrimati Chandc Devi v. *Commissioner of Income-tax,* (1950) 18 I.T.R. 944 and *Musta Qaima Begum,* In re, (1953) 23 I.T.R. 345, Overruled.

Shrimati Damayanti Sahni v. *Commissioner of Income-tax, Delhi,* (1953) 23 I.T.R. 41, Reversed.

Accordingly the shares of the minor children of a woman in the profits or gains of a partnership cannot be included in the income of the woman for assessment to income-tax.

On Appeal from the Judgment and Order, dated the 13th April, 1954, of the Nagpur High Court‡ in Miscellaneous Civil Case No. 71 of 1956.

* C.A. No. 322 of 1955.
† C.A. No. 25 of 1955.
‡ (1955) 27 I.T.R. 9.

17th May, 1957.

AND

On Appeal from the Judgment and Order, date the 26th August, 1952, of the Punjab High Court† in Civil Reference No. 11 of 1952, respectively.

C. K. Daphtary, Solicitor-General of India, (*G. N. Joshi* and *R. H. Dhebar*, Advocates, with him), for Appellant in C.A. No. 322 of 1955 and Respondent in C.A. No. 25 of 1955.

R. J. Kolah, Advocate and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Respondent in C.A. No. 322 of 1955.

G. S. Pathak, Senior Advocate (*M. L. Kapur*, Advocate with him), for Appellant in C.A. No. 25 of 1955.

The Court delivered the following Judgments :—

Bhagwati, J. : (Delivering the Majority Judgment).—These two Appeals with certificates under section 66-A (2) of the Indian Income-Tax Act (hereinafter referred to as the Act) raise a common question of law and will be governed by this common judgment.

The facts leading up to these appeals may be shortly stated as under.

Prior to October 18, 1944, one Rai Bahadur Narsingdas Daga (since deceased), his wife Shrimati SodraDevi (the assessee), and his three major and three minor sons constituted a joint and undivided Hindu family. There was a severance of joint status between the erstwhile members of the said joint family on October 18, 1944 and the joint family properties were accordingly partitioned. On such partition, the business of the Spinning and Weaving Mills and agency shop at Hinganghat fell to the share of the assessee and her three major and three minor sons. A partnership was entered into between the assessee and her three major sons for the purpose of carrying on the business of the Spinning and Weaving Mills and the agency firm at Hinganghat. The three minor sons of the assessee were admitted to the benefits of the partnership. The genuineness of the partnership was not disputed. The only question which arose for the consideration of the Tribunal was whether the income falling to the share of the three minor sons was liable to be included in the total income of the assessee. On a construction of section 16 (3) (*a*) (*ii*) of the Act, the Tribunal held that the income falling to the shares of the three minor sons of the assessee was liable to be included in her total income. The assessee thereupon applied to the Tribunal for a reference to the High Court of Judicature at Nagpur of the question of law arising out of its order under section 66 (1) of the Act and the Tribunal submitted a statement of case referring the following question of law for the determination of the High Court :

> " Whether on a true construction of the provisions of section 16 (3) (*a*) (*ii*) of the Indian Income-tax Act, 1922, the income of the three minor sons of the assessee is liable to be included in her total income."

The High Court heard the reference and came to the conclusion that it was not the intention of the Legislature to include in the income of the mother, the income of her minor children arising from the benefits of partnership of a firm in which the mother is a partner and accordingly answered the referred question in the negative. The High Court, however, granted the necessary certificate under section 66-A (2) of the Act to the Commissioner of Income-tax, Madhya Pradesh and Bhopal and hence Civil Appeal No. 322 of 1955 before us.

One Ishwardas Sahni who died on November 7, 1946, was a partner in the firm of Messrs. Ishwardas Sahni & Bros. The firm's accounting year ended on March 31, 1947. The said Ishwardas Sahni left him surviving his widow Damayanti (the assessee) and two minor sons. The assessee became a partner in the said firm which also admitted her two minor sons to the benefits of the partnership.

† (1953) 23 I.T.R. 41.

The Income-tax authorities included the minor sons' shares in the reconstituted firm's profits in computing the income of the assessee on the ground that "individual" in section 16 (3) (*a*) (*ii*) of the Act meant an individual person of either sex. The Income-tax Appellate Tribunal held that the word "individual" must be taken as referring only to a male assessee wherever that occurred in section 16 (3) and directed the deletion from the assessee's income of the shares of her minor sons in the profits of the firm. At the instance of the Commissioner of Income-tax, Delhi, the Tribunal referred to the High Court of Punjab at Simla the question of law arising out of its order under section 66 (1) of the Act together with a statement of case. The referred question was :

"Whether the word "individual" in section 16 (3) (*a*) (*ii*) of the Income Tax Act, 1922, includes also a female and whether the shares of the two minor sons of Shrimati Damayanti Sahni in the profits of the re-constituted firm of Messrs. Ishwardas Sahni and Brothers should be included in the income of Shrimati Damayanti Sahni in assessing her income, profits and gains."

The High Court heard the reference and following the decision given by the High Court of Allahabad in *Shrimati Chanda Devi* v. *Commissioner of Income-tax*[1], answered the referred question in the affirmative. The assessee obtained the requisite certificate under section 66-A (2) of the Act from the High Court and that is how Civil Appeal No. 25 of 1955 is before us.

The common question of law which we have to determine in these appeals is whether the word "individual" in section 16 (3) (*a*) (*ii*) of the Act includes also a female and the income of the minor sons derived from a partnership to the benefits of which they have been admitted is liable to be included in the income of the mother who is a member of that partnership.

Section 16 (3) of the Act provides :

"In computing the total income of any individual for the purpose of assessment, there shall be included—(*a*) so much of the income of a wife or minor child of such individual as arises directly or indirectly :

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of the partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration ; and

(*b*) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both."

Section 3 of the Act may also be referred to in this context and it runs as follows :

Section 3 : *Charge of Income-tax* :—" Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

The same description of the assessee is also to be found in section 4-A which deals with residence in the taxable territories, section 48 dealing with refund and section 58 dealing with the charge of super-tax.

The word assessee is wide enough to cover not only an "individual" but also a Hindu undivided family, company and local authority and every firm and other association of persons or the partners of the firm or the members of the association individually. Whereas the word "individual" is narrower in its connotation being one of the units for the purposes of taxation than the word "assessee", the word "individual" has not been defined in the Act and there is authority for the proposition that the word "individual" does not mean only a human being but is wide enough to include a group of persons forming a unit. It has been held that the word

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1. (1950) 18 I.T.R. 944.

"individual" includes a Corporation created by a statute, *e.g.*, a University or a Bar Council, or the trustees of a baronetcy trust incorporated by a Baronetcy Act. It would also include a minor or a person of unsound mind. If this is the connotation of the word "individual" it follows that when section 16 (3) talks of an "individual" it is only in a restricted sense that the word has been used. The section only talks of "individual" capable of having a wife or minor child or both. It therefore necessarily excludes from its purview a group of persons forming a unit or a corporation created by a statute and is confined only to human beings who in the context would be comprised within that category.

The Revenue urges before us that the word "individual" as used *qua* human beings is capable of including within its connotation a male as well as a female of the species and having regard to the context in which the word has been used in section 16 (3), it should be construed as meaning a male of the species when used in juxtaposition with " a wife " and as meaning both a male and a female when used in juxtaposition with "minor child" so that when section 16 (3) talks of "such individual" in sub-clauses (*ii*) and (*iv*) of clause (*a*) thereof it refers to both a male and female of the species so as to include within its compass not only a father of the minor child but also a mother.

The assessees, on the other hand, contend that the word "individual" used in section 16 (3) is not used in its generic sense but is used in a restricted and narrower sense as connoting only human being and if it is thus restricted there is ample justification for restricting it still further to the male of the species when regarded in the context of section 16 (3). Sub-clauses (*i*) to (*iv*) of clause (*a*) are specific cases where the income of a wife or a minor child of " such individual" arising directly or indirectly from the several sources therein indicated is to be included in computing the total income of the "individual" for the purpose of assessment and the word could not have been used in a different sense for the purposes of sub-clauses (*i*) and (*iii*) and sub-clauses (*ii*) and (*iv*) of clause (*a*). The word "such individual" as used in sub-clause (*a*) can only have been used in one sense and one sense only and if that is the sense in which it could have been used "such individual" should be one who is capable of having a wife or minor child or both and that individual can only be a male of the species and not a female.

The question for our determination is a very narrow one and it turns on the construction of section 16 (3) of the Act. The High Court of Madhya Pradesh plunged headlong into a discussion of the reasons which motivated the Legislature into enacting section 16 (3) by Act IV of 1937, and took into consideration the recommendations made in the Income Tax Enquiry Report, 1936 and also the statement of objects and reasons for the enactment of the same, without considering in the first instance whether there was any ambiguity in the word "individual" as used therein. It is clear that unless there is any such ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice (*Per* Lord Ashbourne in *Nairn* v. *University of St. Andrews and others*[1]. In the latter event the following observations of Lord Lindley, M. R., in *Thomson* v. *Lord Clanmorris*[2], would be apposite :

> " In construing any statutory enactment, regard must be had not only to the words used, but to the history of the Act and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided " (*See also* the observations of Goddard, C.J., in *R.* v. *Paddington and St. Marylebone Rent Tribunal*[3]).

The position in law has been thus enunciated in the judgment of Das, Acting C.J. (as he then was) in the *Bengal Immunity Company Limited* v. *State of Bihar and others*[4].

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1. L.R. (1909) A.C. 147.
2. L.R. (1900) 1 Ch. D. 718, 725.
3. (1949) 65 T.L.R. 200, 203.
4. (1955) 2 M.L.J. (S.C.) 168: (1955) S.C.J. 672 : (1955) 2 S.C.R. 603, 632 (S.C.).

"It is sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon's case*[1], was decided that—

"...........for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before the making of the Act.,

2nd. What was the mischief and defect for which the common law did not provide.,

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth., and

4th. The true reason of the remedy; and then the office of all Judges is always to make such construction as shall supress the mischief, and advance the remedy, and to supress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*".

In In re *Mayfair Property Company*[1], Lindley, M.R., in 1898 found the rule "as necessary now as it was when Lord Coke reported *Heydon's case*"[2]. In *Eastman Photographic Materials Company* v. *Comptroller General of Patents, Designs and Trade Marks*[3], Earl of Halsbury re-affirmed the rule as follows:

"My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy. These three things being compared, I cannot doubt the conclusion."

The High Court of Punjab based its conclusion primarily on the use of the word "or" between the word "wife" and the words "minor child" in section 16 (3) (*a*) of the Act and it was of opinion that these words were used disjunctively and the "individual referred to in section 16 (3) (*a*) of the Act may have a wife and minor child or may not have a wife but have a minor child." If the individual assessed to income-tax is a female that individual will have no wife but she may have a minor child and therefore section 16 (3) (*a*) of the Act does not imply that the individual must necessarily be a male.

The argument based on the disjunctive user of the word "wife" and the words "minor child" is capable of being summarily disposed of. Even if the words "such individual" in section 16 (3) (*a*) of the Act meant only a male of the species the word "wife" and the words "minor child" could only have been used with the word "or" in between. A male of the species may not necessarily have both a wife and a minor child. He may have a wife but no "minor child". He may have a minor child but may have no wife at the relevant period. If therefore provision had to be made for the inclusion of the income of a wife or minor child or both in the total income of a male of the species the word "or" was absolutely necessary to be interposed between the word "wife" and the words "minor child". To construe the word "or" as disjunctive between the word "wife" and the words "minor child" does not necessarily lead to the conclusion that the words "such individual" were used for both a male and a female of the species and were necessarily inconsistent with the user of those words for the male of the species if the context otherwise lead to that conclusion. The reasoning adopted by the learned Judges of the High Court of Punjab therefore does not clinch the matter.

We have therefore got to examine whether the use of the word "individual" in section 16 (3) (*a*) of the Act is in any manner ambiguous. The opening words of section 16 (3) talk of "any individual" whose total income has got to be computed for the purpose of assessment and the words "such individual" used in section 16 (3) (*a*) have reference only to that individual. That individual must be an assessee and it is in the computation of his total income for the purpose of assessment that the income of the persons mentioned in clauses (*a*) and (*b*) have got to be included. Sub-clause (*a*) refers to two distinct sets of persons bearing a relationship with "such individual", the assessee. One is a wife and the other is a minor child. The case of the wife is dealt with in sub-clauses (*i*) and (*iii*) and the case of a minor

1. (1584) 3 Co. Rep. 7-a; 76 E.R. 637.
2. L.R. (1898) 2 Ch. 28, 35.
3. L.R. (1898) A.C. 571, 576.

child is dealt in sub-clauses (*ii*) and (*iv*). Sub-clauses (*i*) and (*iii*) use the word " her husband " or " the husband " in place of the words " such individual " with reference to the income derived by the wife in the circumstances therein mentioned. though, it may be observed that the user of the words " such individual " would not have made the slightest difference to the position. Sub-clauses (*ii*) and (*iv*) which deal with a " minor child " use the words " such individual " in relation to the minor child whose income under the circumstances therein mentioned has to be included in computing the total income of "such individual " for the purpose of assessment. Whereas the words used in sub-clauses (*i*) and (*iii*) are specific and refer only to "her husband" and "the husband" as "such individual", the words used in sub-clauses (*ii*) and (*iv*) leave it indefinite as to which is meant by the words " such individual " whether a male and/or a female of the species. If the words used in all these four sub-clauses were to be harmoniously read and the two cases which are mentioned in sub-clauses (*i*) and (*iii*) are not to be read differently from the cases mentioned in sub-clauses (*ii*) and (*iv*) the only way in which the words " such individual " as used in sub-clauses (*ii*) and (*iv*) could be understood would be to read them as confined to a male of the species and not including the female. If these words " such individual " as used in sub-clauses (*ii*) and (*iv*) are thus read restricted to a male of the species, all these sub-clauses would have reference only to the male of the species irrespective of the fact that the words " her husband " and " the husband " have been used in sub-clauses (*i*) and (*iii*) instead of the words " such individual. " If the words "such individual " had been used in sub-clauses (*i*) and (*iii*) as they have been used in sub-clauses (*ii*) and (*iv*) the position would have been just the same because in that event also, we would have had to determine whether there was any justification for reading the words " such individual " used with reference to sub-clauses (*i*) and (*iii*) in any different sense from the same words " such individual "as used in sub-clauses (*ii*) and (*iv*). The crux of the question, therefore, is whether the words "such individual " used in the opening part of section 16 (3) (*a*) are used to mean a male of the species when they are read in juxtaposition with the words " a wife " and are used to mean both a male as well as a female of the species, as the case may be, when used in juxtaposition with the words " minor child."

If that was the intention of the Legislature there was nothing to prevent it from dividing clause (*a*) into two sub-clauses whether they were numbered (*a*) and (*ai*) or (*a*) and (*b*) respectively. The Legislature could as well have enacted the provisions in the manner following :—

(*a*) so much of the income of a wife of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband (or such individual) is a partner ; or

(ii) from assets transferred directly or indirectly to the wife by the husband (or such individual) otherwise than for adequate consideration or in connection with an agreement to live apart ;

(*ai*) or (*b*) so much of the income of a minor child of such individual as arises directly or indirectly—

(i) from the admission of the minor to the benefits of the partnership in a firm of which such individual is a partner ; or

(ii) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration.

If these provisions had been enacted in the manner aforesaid it would have been possible to urge, as has been urged before us by the Revenue, that clause (*a*) referred only to a male of the species who only could have a wife and clause (*ai*) or (*b*) referred to a male and/or a female of the species.

The Legislature however chose to adopt a peculiar mode of enactment either for the purpose of economy of words or structural beauty and mixed up both these sets of provisions into the enactment of clause (*a*) of section 16 (3) of the Act as

it stands at present. It rolled in both these sets of cases and used the words "a wife" or "minor child" of "such individual" raising thus the question of construction which has got to be determined by us. "Such individual" as is talked of in section 16 (3) (*a*) may have a wife, may have a minor child or may have both a wife and a minor child. When "such individual" is thought of in connection with a wife, it can only be a male of the species, but when "such individual" is thought of in connection with a minor child it can be both a male as well as a female of the species, though, of course, when "such individual" is thought of in connection with "both" then again it would have to be a male of the species and certainly not a female. Such an interpretation would lead to the interpretation of the same words "such individual" as meaning two different things in two different contexts. They would mean one thing when used in relation to "a wife" and would mean another thing when used in relation to a "minor child". They would be capable of being understood in a narrower sense when used in connection with "a wife" and would be capable of being understood in a wider sense when used in connection with a "minor child". One may as well question the elegance or the propriety of such user of the words "such individual" where the words "as the case may be" are necessarily to be imported in order to understand the true import of these words, when again they are used not in different parts of the same section but at one place only.

If one turns to section 16 (3) (*b*) the words used therein are "transferred.... by "such individual" for the benefit of his wife or a minor child or both". There is the indefinite article "a" used before the words "minor child". If that indefinite article "a" had not been used, the expression would have run "for the benefit of his wife or minor child or both" thus leaving no doubt at all that in clause (*b*) at least the words "such individual" meant only a male of the species. It is urged however that the use of the indefinite article "a" shows that the words "his wife" and "minor child" and "both" have been used disjunctively and should be read in the same manner as in section 16 (3) (*a*) of the Act. The words "his wife" would appropriately go with a male of the species but the words "a minor child" would appropriately go with a male as well as a female of the species, though the word "both" could only be appropriate in relation to a male of the species and not a female who can have a minor child but not both a wife and a minor child. The same want of elegance or propriety can be predicated of this expression also and the use of such expressions both in section 16 (3) (*a*) and section 16 (3) (*b*) raise questions of construction whether what was meant by the Legislature was only a male of the species in both these contexts or a male and/or female of the species, as the case may be, applying one or the other in accordance with the circumstances attendant upon the computation of the total income of "any individual" for the purpose of assessment.

We are of opinion that the very manner in which all the four sub-clauses have been grouped together in section 16 (3) (*a*) and the manner in which the expression "for the benefit of his wife, a minor child or both" is used in section 16 (3) (*b*) renders the words "any individual" or "such individual" ambiguous. There is no knowing with certainty as to whether the Legislature meant to enact these provisions with reference only to a male of the species using the words "any individual" or "such individual" in the narrower sense of the term indicated above or intended to include within the connotation of the words "any individual" or "such individual" also a female of the species, wherever appropriate which would of course only be possible in the cases contemplated in sub-clauses (*ii*) and (*iv*) of section 16 (3) (*a*) and in one of the three cases contemplated in section 16 (3) (*b*). The Legislature certainly was guilty of using an ambiguous term in enacting section 16 (3) of the Act as it did. In order to resolve this ambiguity therefore we must of necessity have resort to the state of the law before the enactment of the provisions; the mischief and defect for which the law did not provide; the remedy which the Legislature resolved and appointed to cure the defect and; the true reason of the remedy within the meaning of the authorities referred to above.

Before the enactment of section 16 (3) of the Act by the Indian Income-tax (Amendment) Act, 1937 (IV of 1937), there was no provision at all for the inclusion of the income of a wife or a minor child in the computation of the total income of "any individual" for the purpose of assessment. Whatever may have been the income of a wife from her membership in a firm of which her husband was a partner or from assets transferred directly or indirectly to her by her husband otherwise than for adequate consideration or in connection with an agreement to live apart, her income was not included in the income of her husband in computing the total income of the husband for the purpose of assessment. Similar was the position in the case of income derived by a minor child from the admission of the minor to the benefits of partnership in a firm of which " such individual " was a partner or from assets transferred directly or indirectly to the minor child, not being a married daughter, by " such individual" otherwise than for adequate consideration. The income derived by such minor child could not be added to the income of the father for the purpose of assessment. The income derived by the wife or minor child could only be included in computing his or its total income for the purposes of assessment and neither the husband nor the father could be made liable for income-tax in respect of such income, whatever may be the reason which actuated them in providing such income for the wife or the minor child.

This position was pregnant with difficulties for the Revenue. There were no doubt genuine cases where a wife or the minor child as the case may be, was provided with such income on *bona fide* severance of joint status between the erstwhile members of a joint and undivided Hindu family and where after such partition the adult member of the family entered into a *bona fide* partnership admitting the minors to the benefits of the partnership. There were, on the other hand, innumerable cases where such severance of joint status was resorted to mainly with a view to evade a higher incidence of income-tax. There were also cases where husbands and fathers provided shares for their wives and minor sons and thus evaded payment of income-tax in regard to their shares in the profits of such partnerships. This evil was so rampant that the Income Tax Enquiry Report, 1936, recognised the same and made the following recommendations for remedying the situation (*vide* pp. 19 & 20 of the Report).

" CHAPTER III—Assessees.

Section I—Individuals.

(*a*) *Wife's Income.*—Our attention has been drawn to the extent to which taxation is avoided by nominal partnerships between husband and wife and minor children. In some parts of the country, avoidance of taxation by this means has attained very serious dimensions. The obvious remedy for this state of affairs so far as husband and wife are concerned is the aggregation for assessment of their incomes, but such a course would involve aggregation in a quite different class of case, *i.e.*, where the wife's income arises from sources unconnected with the husband . . . .

. . . .

We recommend, therefore, that the incomes of a wife should be deemed to be, for Income-tax purposes, the income of her husband, but that where the income of the wife is derived from her personal exertions and is unconnected with any business of her husband, her income from her personal exertions upto a certain limit, say Rs. 500, should not be so included. . . . .

(*b*) *Income of Minor Children.*—There is also a growing and serious tendency to avoid taxation by the admission of minor children to the benefits of partnership in the father's business. Moreover, the admission is, as a rule, merely nominal, but being supported by entries in the firm's books, the Income-tax Officer is rarely in a position to prove that the alleged participation in the benefits of partnership is unreal. . . . .

We suggest that the income of a minor *should be deemed to be the income of the father* (i) if it arises from the benefits of partnership in a business in which the father is a partner or (ii) if, being the income of a minor other than a married daughter, it is derived from assets transferred directly or indirectly to the minor by his or her father or mother, (iii) if it is derived from assets apportioned to him in the partition of a Hindu Undivided Family."

It may be noted that the recommendations of the Enquiry Committee even in the cases hereinbefore mentioned went to the length of including the income of the wife or the minor child as the case may be in the income of the husband or the father in the computation of his total income for the purpose of assessment. The mischief which the Enquiry Report sought to remedy by its recommendations

was one which was the result of husbands entering into nominal partnerships between themselves and their wives and fathers admitting their minor children to the benefits of such partnerships. The mischief, if any, resulting from the mothers admitting their minor children to the benefits of partnerships in which they were members was farthest from the thoughts of the Enquiry Committee and was nowhere sought to be remedied. Having regard to the circumstances which prevailed at the time when the Enquiry Committee made its report, the only mischief which they sought to remedy by their recommendations was the one resulting from the male assessees indulging in such tactics for the evasion of income-tax by creating nominal partnerships between themselves and their wives on the one hand and their minor children on the other.

These recommendations were duly considered by the Government and as a result thereof Act IV of 1937 was enacted introducing section 16 (3) in the Act. What was intended to be done by the Legislature in enacting this amendment may be gleaned to a certain extent from the statement of objects and reasons appended to the Bill which eventually became the amending Act. Though it is not legitimate to refer to the statement of objects and reasons as an aid to the construction or for ascertaining the meaning of any particular word used in the Act or Statute, see *Aswani Kumar Ghose* v. *Arabinda Bose*[1], nevertheless, this Court in the *State of West Bengal* v. *Subodh Gopal Bose and others*[2], referred to the same

> "for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of evil which he sought to remedy."

The statement of objects and reasons which led to the passing of Act IV of 1937, ran as follows :

> "Reference is made in sections 1 and 4 of Chapter III of the Income Tax Enquiry Report, 1936, to the practice of avoiding taxation by means of nominal partnerships between husband and wife or parent and minor child or by the nominal transfer of assets to a wife or minor child (or to an "association" consisting of husband and wife) when there is no substantial separation of the interests of the assessee and the wife or child. These practices are reported to have become very widespread already, with considerable detriment to the revenue, and there is little doubt that if they are not checked there will be progressive deterioration. The proposals in the Report regarding the aggregation of the incomes of husband and wife go beyond the immediate necessities of the case and to that extent their adoption would involve the admission of a new principle which the Government of India do not desire to establish in advance of the general public discussion of the Report which has been arranged ; and the present Bill has been so drafted as to deal only with the abuses to which I have referred."

It is clear from the above extracts that the evil which was sought to be remedied was the one resulting from the wide spread practice of husbands entering into nominal partnerships with their wives and fathers admitting their minor children to the benefits of the partnerships of which they were members. This evil was sought to be remedied by the enactment of section 16 (3) in the Act. If this background of the enactment of section 16 (3) is borne in mind, there is no room for any doubt that howsoever that mischief was sought to be remedied by the amending Act, the only intention of the Legislature in doing so was to include the income derived by the wife or a minor child, in the computation of the total income of the male assessee the husband or the father, as the case may be, for the purpose of asessment. If that was the position, howsoever wide the words "any individual" or "such individual" as used in section 16 (3) and section 16 (3) (*a*) may appear to be so as to include within their connotation the male as well as the female of the species taken by themselves, these words in the context could only have been meant as restricted to the male and not including the female of the species. If these words are used as referring only to the male of the species the whole of the section 16 (3) (*a*) can be read harmoniously in the manner above comprehending within its scope all the four cases specified in sub-clauses (i) to (iv) thereof and so also section 16 (3)(*b*). We are therefore of opinion that the words "any individual" and "such individual" occurring in section 16 (3) and section 16 (3)(*a*) of the Act are restricted in their connotation to mean only the male of the species, and do not include the female of the species, even though

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1. (1953) S.C.R. 1 : (1952) S.C.J. 568. 2. (1954) S.C.R. 587, 628 : (1954) S.C.J. 127.

by a disjunctive reading of the expression "the wife" or "a minor child" of "such individual" in section 16 (3) (*a*) and the expression "by such individual for the benefit of his wife or a minor child or both" in section 16 (3) (*b*), it may be possible in the particular instances of the mothers being connected with the minor children in the manner suggested by the Revenue to include the mothers also within the connotation of these words. Such inclusion which involves different interpretations of the words "any individual" or "such individual" in the different contexts could never have been intended by the legislature and would in any event involve the addition of the words "as the case may be" which addition is not normally permissible in the interpretation of a statute.

We shall now refer to the decisions of the several High Courts in India bearing on the construction of section 16 (3) of the Act. The earliest decision is that of the High Court of Allahabad in *Shrimati Chanda Devi* v. *Commissioner of Income-tax, U.P.*[1] That decision emphasised that the sub-clause (i) of clause (*a*) of sub-section (3) of section 16 made it clear that where the husband was a partner the income of the wife, by reason of her being a member of the firm, was to be computed in the income of the husband, and if the Legislature had intended that the word "individual" in sub-clause (ii) shoul mean only the father and not the mother there was no reason why they should not have used similar language as in sub-clause (i) and said "from the admission of the minor to the benefits of partnership in a firm in which *his father* is a partner." Why the Legislature used a particular expression and why it did not use any expression which would have been clearer and better expressive of its intention is really difficult to fathom. We may as well wonder why the Legislature did not use the words "such individual" in sub-clauses (i) and (iii) of section 16 (3) (*a*) in place of the words "her husband" or "the husband" when the intention of the Legislature would have been equally carried out by the use of those words. It may be that the draftsman considered the use of the words "her husband" or "the husband" when he used the same in juxtaposition with the words "a wife" as appropriate or more elegant and therefore ignored the obvious user of the words "such individual" which would have been equally appropriate in that context. It would have been better expressive of the intention of the Legislature, as we have already divined above (*viz.*, to use the words "any individual" and "such individual" in section 16 (3) and section 16 (3) (*a*) respectively in the restricted meaning of the male of the species), to have used the words "the father" in place of the words "such individual" in sub-clauses (ii) and (iv) of section 16 (3) (*a*). It is however difficult to fathom the mind of the draftsman when he used one particular expression in preference to the other and not much help can be derived from the ratio adopted by the learned Judges of the High Court of Allahabad in the decision just referred to. It is also significant to observe that the learned Judges considered that the language of the section does not create any real difficulty and therefore did not think it worth their while to refer to the Income Tax Enquiry Report, 1936, and the passage therefrom which we have quoted above. Suffice it to say that we do not concur with the reasoning adopted by the learned Judges of the High Court of Allahabad and are of the opinion that the decision just referred to in so far as it militates against the reasoning adopted by us herein is incorrect.

The later case of *Musta Qudma Begum*, In re[2], decided by the same High Court merely follows the judgment in *Shrimati Chanda Devi's Case*[3], and is subject to the same criticism as above.

The decision of the High Court of Punjab in *Shrimati Damayanti Sahni* v. *Commissioner of Income-tax, Delhi*[4], is the one under appeal before us in Civil Appeal No. 25 of 1955. The learned Judges there followed the decision of the High Court of Allahabad in *Shrimati Chanda Devi's Case*[3], and answered the referred question in the affirmative. It follows from what we have said above that that decision is also incorrect and the referred question ought to have been answered by them in the negative.

1. (1950) 18 I.T.R. 944.
2. (1953) 23 I.T.R. 345.
3. (1950) 18 I.T.R. 944.
4. (1953) 23 I.T.R. 41.

The latest decision in this context is that of the High Court of Madhya Pradesh in the *Commissioner of Income-tax, Madhya Pradesh and Bhopal* v. *Smt. Sodra Devi*[1], which is the subject-matter of Civil Appeal No. 322 of 1955 before us. The High Court there observed that the word " individual " as used in section 16 (3) of the Act was ambiguous and referred to the above quoted passage from the Inquiry Committee's Report, 1936, as also the statement of objects and reasons and came to the conclusion that the word " individual " was restricted to the male of the species and it was not the intention of the Legislature to impose additional tax on a mother assessee by including in her income the income of her minor children arising from the benefits of partnership of a firm in which the mother and the minors were partners. We are of opinion that the decision reached by the learned Judges of the High Court of Madhya Pradesh in that case was correct and the referred question was rightly answered by them in the negative.

The result therefore is that Civil Appeal No. 322 of 1955 will be dismissed with costs and Civil Appeal No. 25 of 1955 will be allowed with costs, the referred question being answered in the negative.

S. K. Das, J.—The substantial question which falls for decision in these two appeals is if the word " individual " in sub-section (3) of section 16 of the Indian Income-tax Act, hereinafter referred to as the Act, includes also a female, and therefore the income of the minor sons which arises directly or indirectly from their admission to the benefits of partnership in a firm of which their mother is a member is to be included in computing the total income of the mother within the meaning of sub-section (3), clause (*a*), sub-clause (ii), of section 16. The question is really one of pure construction, that is, construction of sub-section (3) of section 16 of the Act. Nothing turns upon the facts of the case, and as the material facts have been clearly set out in the judgment just read by my learned brother Bhagwati, J., I do not think that any useful purpose will be served by re-stating them.

Therefore, I proceed at once to a consideration of sub-section (3) of section 16 of the Act and state at the very outset that, to my great regret, I have come to a conclusion different from that of my learned brethren. I shall presently read the sub-section; but before I do so, it will help the exposition which follows if I explain in a few words the standpoint from which I have approached the question. Speaking generally, the expression "construction" includes two things: first, the meaning of the words; and, secondly, their legal effect or the effect which is to be given to them by the Courts. As in the case of documents, so in the case of statutes also, they should be construed in a manner which carries out the intention of the Legislature. It may be reasonably asked—how is the intention of the Legislature to be discovered? The answer is that the intention must first be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be attained by it; in other words, the intention is best declared by the words themselves, and the words of a statute are to be interpreted as bearing their ordinary, natural meaning unless the context requires a different meaning to be given to them. If, however, the words are ambiguous, the policy of the legislation and the scope and object of the statute, where these can be discovered, will show the intention, which may further be brought to light by applying the various well settled rules and presumptions of construction. One such rule is that the statute must be read as a whole and the construction made of all the parts together. I am emphasising this aspect of the question to guard against any possible suggestion that I have started with some *a priori* idea of the meaning or intention behind sub-section (3) of section 16 of the Act and have tried by construction to work that idea into the words of the sub-section. I have been conscious all through of the warning given by Lord Halsbury, in the following observations in *Leader* v. *Duffey*[2]:

" All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view, which is I think in accordance with reason and common-sense, that, whatever the instru-

1. (1955) 27 I.T.R. 9.

2. L.R. (1888) 13 App. Cas. 294, 301.

ment, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the presumption so made."

Keeping that warning in mind, I shall first take the words of sub-section (3) of section 16 and see if they are plain or unambiguous. Alternatively, I shall also consider the proper construction of sub-section (3) of section 16 on the assumption that the word "individual" used in the sub-section is ambiguous and should therefore be interpreted consistently with the principles laid down in the *locus classicus* on the subject, namely, the clelebrated *Heydon's case*[1], reported by Lord Coke and decided by the Barons of the Exchequer in the sixteenth century.

I shall now read sub-section (3) of section 16 of the Act :

"16 (3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(*a*) so much of the income of a wife or a minor child of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration ; and

(*b*) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both."

I have already stated that the sub-section must be read as a whole and in the context of other provisions of the Act, particularly section 16 of which it is a part ; it is only then that we shall arrive at its correct meaning consistent with the other provisions of the Act. The word "individual" used in sub-section (3) of section 16 occurs in several other provisions of the Act, *e.g.*, section 3, section 4-A, section 48 and section 55. It is necessary to quote section 3 *in extenso*. That section is in these terms :

"Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

It is not disputed before us that the word "individual" occurring in sections 3, 4-A, 48 and 55 means either a male or a female; nor has it been disputed before us that, according to the ordinary accepted meaning of the word, it means a single human being as opposed to "society", "family", etc., and that a single human being may be of either sex. Learned counsel appearing for the assessees in the two appeals have pointed out, however, that the word "individual" has not the same width of meaning in sub-section (3) of section 16 as it has in the other provisions ; for example, in section 3, the word "individual" has been held to include a Corporation created by statute, *e.g.*, a University or a Bar Council or the trustees of a baronetcy trust incorporated by a Baronetcy Act, etc., whereas sub-section (3) of section 16 makes it quite clear that the word "individual" there does not include a Corporation created by a statute. This indeed is correct. But the question before us is whether, in its context, sub-section (3) of section 16 imposes a further restriction on the word "individual", confining it to a male individual only. The critical question before us is whether such a further restriction is imposed on the word "individual" either by the express words used in the sub-section or by necessary implication from the clauses and sub-clauses thereof.

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1. (1584) 3 Co. Rep. 7-a.

It is said to be a presumption in construction that the same words are used in the same meaning in the same statute and particularly in the same section or sub-section. The presumption is, however, of the slightest, and there are many instances where the application of this rule or presumption is impossible. The same words may often receive a different interpretation in different parts of the same Act, for words used with reference to one set of circumstances "may convey an intention quite different from what the self same set of words used with reference to another set of circumstances would or might have produced." (*Edinburgh Street Tramways Co.* v. *Torbain*[1], Per Lord Blackburn). The classic example of the same word having a somewhat different meaning in the same section is provided by Offences Against the Person Act, 1861, section 57 of which deals with bigamy and enacts :

"Whosoever, being married shall marry any other person during the life of the former husband or wife......shall be guilty of felony."

It is obvious that the word "marry" is used in two different senses in the same section. There is another classic example in Article 31 of our Constitution where the word "law" in clause (3) of the said Article has been used in different senses. This is referred to in a decision of this Court in the *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*[2].

The word "individual" is not defined in the Act, but the meaning of the word in sections 3, 4-A, 48 and 55 is reasonably clear. The word "assessee" is defined in clause (2) of section 2 of the Act as meaning a person by whom income-tax or any other sum of money (which would include super-tax, penalty or interest) is payable under the Act. It also includes every person in respect of whom any proceeding under the Act is taken for the assessment (*a*) of his income, (*b*) of his loss or (*c*) of the amount of refund due to him. Thus the definition covers two categories : first, persons by whom any tax, penalty or interest is payable under the Act, whether any proceeding under the Act has been actually taken against them or not ; and secondly, persons against whom any of the proceedings specified in this clause has been taken, whether he is or is not liable to pay any tax, penalty or interest. 'A person,' under section 3 (42) of the General Clauses Act, includes any company or association or body of individuals, whether incorporated or not ; and under clause (9) of the section 'a person' also includes a Hindu undivided family and a local authority. Thus, we have six categories of assessees referred to in section 3—(*a*) the individual, (*b*) the Hindu undivided family, (*c*) the local authority, (*d*) the company, (*e*) the firm and (*f*) other association of persons. Read in the context of section 3 of the Act, the word "individual" means, in the other sections, one of the six categories of assessees referred to in section 3. The same category is also referred to in sub-section (3) of section 16, subject only to this restriction that in the context of the sub-section, the word "individual" does not include a Corporation, etc.

We now turn to the critical question before us—is there a further restriction in the sub-section confining the word "individual" to a male individual only? My answer is that there is nothing in the context of section 16 or of the sub-section which confines the word "individual" to a male individual only. Section 16 deals with the computation of total income and provides what sums are to be included or excluded in determining the total income. The effect of including exempted income in the assessee's total income is mainly two-fold: first, the tax payable by the assessee is determined with reference to the total income and therefore exempted income which is included in the total income would affect the rate of tax applicable to the chargeable portion of the total income ; secondly, in several cases reliefs are given, or calculations made with reference to the total income. Sub-section (3) of section 16 appears *ex facie* to be directed towards preventing an individual's attempt to avoid or reduce the incidence of tax by transferring the assets to his wife or a minor child or admitting the wife as a partner or admitting a minor child to the benefits of partnership in a firm in which such individual is a partner. I agree that the sub-section

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1. (1877) L.R. 3 A. C. 58, 68.
2. (1952) S.C.R. 889, 908, 909 : (1952) S.C.J. 427.

creates, to some extent, an artificial liability to tax by including the income of A in the income of B, and must therefore be strictly construed ; that merely means that the words of the sub-section must be given their strictly natural meaning, and there should be no attempt at artificial stretching one way or the other.

What then is the proper construction of the sub-section ? It naturally falls into three interconnected parts. The first part controls both clause (*a*) and clause (*b*), and states that " in computing the total income of any individual for the purpose of assessment, there shall be included so much of the income, etc.", as is specified in clauses (*a*) and (*b*). The second part is clause (*a*) itself which starts with an opening sentence that " so much of the income of a wife or minor child of such individual as arises directly or indirectly " from four specific cases shall be included in the total income of the individual, and then the cases are enumerated in four sub-clauses numbered (i), (ii) (iii) and (iv). Then, comes the third part which deals with clause (*b*). I have divided the sub-section into its three natural parts, but I must make it clear that all the three parts must be construed together as they are interconnected and interdependent. In the first part, there is no difficulty whatsoever, in my opinion, in giving the word " individual " its natural meaning, that is, that the word means either a male or a female. The opening sentence of clause (*a*) contains the expression " so much of the income of a wife or minor child of such individual ". Does the use of the word "individual" in the opening sentence of clause (*a*) give rise to any ambiguity or difficulty ? I do not think that it does. It is quite obvious that a female individual cannot have a wife, but she can have a minor child whereas a male individual can have a wife, minor child or both. It has been argued that clause (*a*) must be interpreted *noscitur a sociis*, and as the expression " a wife or minor child " is capable of meaning only when used in connection with a male individual, the whole sub-section must be confined to a male individual. I am unable to accede to this argument. The collocation or association of the words "a wife or minor child " in connection with the words " such individual " in the opening sentence of clause (*a*) does not necessarily mean that the individual contempleted is a male individual only. I agree that the word "or" in between the words " wife " and " minor child " must be there, even when the individual talked of is a male only; in other words, the use of the disjunctive word " or " does not necessarily clinch the issue. But I do not see any real difficulty in reading the opening sentence of clause (*a*) distributively so as to mean a male individual when the wife is being talked of, and either a male or a female individual when a minor child is talked of. I do not think that such a construction does any violence to the words used ; on the contrary, in my opinion, it gives effect to the plain meaning of the word " individual ".

Turning now to the sub-clauses numbered (*i*) to (*iv*), there can be no doubt from the phraseology used that sub-clauses (*i*) and (*iii*) refer only to a male individual, because a female individual cannot have a wife. It is worthy of note, however—and this is very important—that sub-clauses (*ii*) and (*iv*) make it equally clear that they are not confined to the male individual only in the manner in which sub-clauses (*i*) and (*iii*) are so confined. In sub-clauses (*i*) and (*iii*) the word " individual " is not used, and the words used are " her husband " and "the husband ". In sub-clauses (*ii*) and (*iv*) the words used are " such individual ". Why did the Legislature make this difference in phraseology? If the intention was to confine the entire sub-section to a male individual only, nothing could have been easier than to qualify the word " individual " by the adjective " male " in the first part of the sub-section which controls both clauses (*a*) and (*b*) ; alternatively, in sub-clauses (*ii*) and (*iv*) it would have been easy to use the word " father " instead of " such individual ". It is true that a change of language is some, though possibly slight, indication of a change of intention. I am unable, however, to accept the argument advanced before us that the phraseology employed in sub-clauses (*i*) and (*iii*) different as it is from that employed in sub-clauses (*ii*) and (*iv*) can be accounted for on the ground of elegance or felicity of expression. It seems to me that if the intention was to confine the word " individual " to a male individual only, elegance and clarity both required that the word " individual " should be qualified by the ad-

jective " male ", and the word " father " should have been used in sub-clauses (*ii*) and (*iv*). I am aware that a draftsman often uses different words merely to avoid repetition. I am also aware that it is dangerous to suppose that the Legislature foresees every possible result that may ensue from the "unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out . . . . this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference " (as *Per* Lord Loreburn, L.C. in *Nairn* v. *University of St. Andrews and others*[1]). But what is noteworthy in the present case is that the difference in phraseology between sub-clauses (*i*) and (*iii*) on the one side and sub-clauses (*ii*) and (*iv*) on the other, is so striking that the conclusion appears to me to be reasonably plain ; it is not really a case of the unguarded use of a single word or picking out an expression here or picking out another expression there in order to piece out some remote inference. The striking difference in phraseology hits, as it were, one in the face when one reads the four sub-clauses. It seems to me that the meaning is very clear. In the opening part of clause (*a*), the word " individual " is used to mean a male or a female ; two of the sub-clauses, however, are confined to the male only and therefore the word " husband " is used in juxtaposition to the word "wife". In the other two sub-clauses, however, the word " individual " is used in order to make it clear that they refer either to a male or to a female individual. I do not see any incongruity or disharmony in the enumeration of the four sub-clauses, nor do I appreciate the argument urged before us that the word " individual ", on the construction adopted by me, has a different meaning in two of the four sub-clauses of clause (*a*). The word " individual " has and retains the same meaning, namely a male or a female, all throughout the sub-section. All that happens is that in two of the sub-clauses of clause (*a*), when the Legislature intends that they should be confined to a male individual only, the word " husband " is used to make the intention clear. On the same reasoning, when the Legislature intends in two other sub-clauses that they should apply to either a male or a female, the word " individual " is used to include either of them. I am unable to accept the contention that such an interpretation offends against the rule of harmonious construction. So far as clause (*b*) of the sub-section is concerned, the word " individual ' is again used and that again relates to a male or a female. The last part of the clause reads " by such individual for the benefit of his wife or a minor child or both." Here again the sentence has to be read distributively—that is, when the wife is talked of, the individual can only be a male ; when a minor child is talked of, the individual can be a male or a female; when both wife and minor child are talked of, the individual can again be a male only. There was some argument before us with regard to the use of the indefinite article " a " before the words " minor child " and it was submitted by the learned Solicitor-General that if the Legislature intended to confine clause (*b*) to a male individual only, it could have easily dropped the indefinite article and used the word " his " before the words " minor child ". Personally, I do not attach much significance to the use of the indefinite article " a". It is to be noted that no such indefinite article is used before the words "minor child " in the opening sentence of clause (*a*) ; but I do not see any compelling reasons why the natural meaning of the word " individual " should not be given to it in clause (*a*) and clause (*b*) of the sub-section. Such meaning can be easily given to both the clauses if they are read distributively, and such reading does not, in my opinion, do any violence to the language used.

On a plain reading of the sub-section, I have come to the conclusion that there really is no ambiguity and the word "individual " has been used in the sub-section in its ordinary accepted connotation, that is, either a male or a female individual; two of the sub-clauses of clause (*a*) are no doubt confined to a male individual and that has been made clear by the use of the words " wife ' and " husband ", instead of the words " such individual ".

Assuming, however, that there is some ambiguity in the sub-section by reason of (1) the use of the phraseology in sub-clauses (*i*) and (*iii*) of clause (*a*), and (2) of

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1. L.R. (1909) A.C. 147, 161.

the opening sentence of clause (*a*) which controls all the four sub-clauses of that clause, what then is the position? The four principles laid down in *Heydon's case*[1] have been thus summarised :

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial restrictive or enlarging of the common law) four things are to be discerned and considered : (1) what was the common law before the passing of the Act ; (2) what was the mischief and defect for which the common law did not provide ; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth ; (4) the true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remdey and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

Let me now apply these principles in the construction of sub-section (3) of section 16 of the Act.

The sub-section was introduced in 1937 and before the enactment of the sub-section, there was no provision for the inclusion of the income of a wife or a minor child in the computation of the total income of an individual. The Income Tax Enquiry Report, 1936, referred to the widespread evil of the evasion of tax by the severance of the joint status amongst members of a joint and undivided Hindu family. The Report said :

"Our attention has been drawn to the extent to which taxation is avoided by nominal partnerships between husband and wife and minor children. In some parts of the country, avoidance of taxation by this means has attained very serious dimensions. The obvious remedy for this state of affairs so far as husband and wife are concerned is the aggregation for assessment of their incomes, but such a course would involve aggregation in a quite different class of case, *i.e.*, where the wife's income arises from sources quite unconnected with the husband..............................

....

We recommend, therefore, that the income of a wife should be deemed to be, for Income-tax purposes, the income of her husband, but that where the income of the wife is derived from her personal exertions and is unconnected with any business of her husband, her income from her personal exertions up to a certain limit, say Rs. 500, should not be so included. . . . .

(*b*) *Income of minor children*.—There is also a growing and serious tendency to avoid taxation by the admission of minor children to the benefits of partnership in the father's business. Moreover the admission is, as a rule, merely nominal, but being supported by entries in the firm's books, the Income-tax Officer is rarely in a position to prove that the alleged participation in the benefits of partnership is unreal.

. . . .

We suggest that the income of a minor should be deemed to be the income of the father (*i*) if it arises from the benefits of partnership in a business in which the father is a partner or (*ii*) if, being the income of a minor other than a married daughter, it is derived from assets transferred directly or indirectly to the minor by his or her father or mother, (*iii*) if it is derived from assets apportioned to him in the partition of a Hindu Undivided Family."

It is clear, however, that the report is of very little help in the construction of the sub-section, because the Legislature did not accept in full the recommendations made in the Report. Two of the rules in *Heydon's case*[1] lay down (1) that we must find what was the mischief or defect for which the earlier law did not provide and (2) what remedy the Parliament has resolved and appointed to cure the mischief or defect. In the case under our consideration, the interpretation which has been put by me on sub-section (3) of section 16 does not militate against any of the aforesaid rules of *Heydon's case*[1]. The interpretation put by me undoubtedly remedies the mischief or defect for which the earlier law did not provide. The only serious criticism made by learned counsel for the assessees against that interpretation is that the remedy not merely cures the mischief for which the earlier law did not provide, but it goes a little further and attacks the evil even when the evil is committed by a female individual, though the Income Tax Enquiry Report (except in one part) did not in specific terms refer to such an evil committed by a female individual. I can see nothing in the rules laid down in *Heydon's case*[1] which militates against the view taken by me. There is no presumption that, while remedying an evil, the Legislature may not cast its net very wide so as to remedy the evil in all its aspects. Let

1. (1584) 3 Co. Rep. 7-a: 76 E.R. 637.

me again refer to sub-clauses (*i*) and (*ii*) of clause (*a*) of sub-section (3) of section 16 of the Act. Those two sub-clauses are absolute and unqualified in terms and not subject to any exception. If the wife owns and manages a business and she takes her husband into partnership with her in the business, the result of the partnership would be that the wife's income from the business would be no longer taxable in her hands but would be included in the total income of her husband under the sub-section, even though the husband may be a dormant partner. This clearly shows that the Legislature was not confining itself to the recommendations made in the Income Tax Enquiry Report. What is to be included in the total income of an individual under clause (*a*) is the income of a wife or minor child arising directly or indirectly "from the membership of the wife" in the firm or "from the admission of the minor to the benefits of partnership" in the firm of which the individual is a partner. The clause covers the share of the profits of the firm received by the wife in her capacity as a partner or by the minor child in his or her capacity as one admitted to the benefits of partnership. But the income received from the firm by the wife or the minor child under any other contract with the firm or in any other capacity, does not fall within the clause and is not included in the husband's or parent's total income.

From what is stated above, it is clear that the Legislature did not confine itself strictly or solely to the recommendations made by the Income Tax Enquiry Committee but provided for all such aspects of the evil or mischief as it thought fit to remedy by the Indian Income-tax (Amendment) Act, 1937 (IV of 1937). In these circumstances, I do not think that the recommendations made by the Income-tax Enquiry Committee can be relied upon to restrict the meaning of the word "individual" used in sub-section (3) of section 16 of the Act. As to the Statement of Objects and Reasons which led to the passing of Act(IV of 1937)and which has been set out in the judgment of the High Court of Madhya Pradesh, I do not think that the Statement can be referred to as an aid to construction for ascertaining the meaning of the word "individual" used in the sub-section. Even if it is referred to "for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy", the use of the word "parent" in the Statement of Objects and Reasons shows that the evil was not confined to the male individual only, and the sponsor of the Bill was aware of it. The Statement reads :

> " Sec. 16 (3) was thus designed to bring within the ambit of taxation incomes of wives and minor children as income of husband or *parent*, which otherwise would escape the whole burden of taxation."

I emphasise the use of the word "parent" which would show that the evil contemplated was an evil which was not confined to the "father" only but included the mother as well.

My conclusion therefore is that there is nothing in the policy of the legislation and the scope and object of the statute which compels one to cut down the natural meaning of the word "individual" used in sub-section (3) of section 16 of the Act so as to confine it to a male individual alone.

I now turn to such authorities as have been cited before us. There has been a difference of opinion in the High Courts with regard to the interpretation of sub-section (3) of section 16 of the Act. In *Shrimati Chanda Devi* v. *Commissioner of Income-tax*[1], the Allahabad High Court has taken the view that the minor's income which arises directly or indirectly from the admission of the minor to the benefits of partnership in a firm of which the mother is a partner,can be included in the mother's assessable income under section 16 (3) (*a*) (*ii*) of the Act. The Allahabad High Court proceeded on the footing that the language of the sub-section did not create any real difficulty and it was not open to it take the help of the Income-tax Enquiry Report. I have considered this case from both the points of view, and have arrived at the same conclusion at which the Allahabad High Court arrived. It is not necessary to mention the other reasons given by the Allahabad High Court, because they

1. (1950) 18 I.T.R. 944.

have already been stated by me in an earlier part of this judgment. This decision of the Allahabad High Court was followed by the Punjab High Court in the *Commissioner of Income-tax, Delhi* v. *Shrimati Damayanti Sahni*[1], which has given rise to one of the two appeals before us. The Punjab High Court gave no additional reason except to state that in clause (*a*) of sub-section (3) of section 16, the word "wife" and the words "minor child" were used disjunctively. I have already stated that the use of the disjunctive "or" is not decisive; but there is no real difficulty in reading clauses (*a*) and (*b*) distributively. The Madhya Pradesh High Court took a different view in *Sodradevi N. Daga* v. *Commissioner of Income-tax*[2], which has given rise to the other appeal before us. In my view, the learned Judges in that case did not attach sufficient importance to sub-clauses (*ii*) and (*iv*) of clause (*a*). If I may say so with great respect, they confined their attention primarily to sub-clauses (*i*) and (*iii*) of clause (*a*) and to clause (*b*), and from those provisions they inferred that the intention was to confine the word "individual" to a male individual. I venture to think that all the three parts of the sub-section, including the four sub-clauses of clause (*a*), must be read together in order to understand the true meaning and effect of the sub-section. The learned Judges further seemed to think that the use of the words "such individual" in sub-clause (*ii*) of clause (*a*) was due to inadvertence. I am unable to agree. I have already pointed out that the phraseology in sub-clauses (*i*) and (*iii*) of clause (*a*) is so strikingly different from the phraseology used in sub-clauses (*ii*) and (*iv*) that only one and one reasonable conclusion can be drawn, namely, that the word individual has been used in its accepted connotation, and when the Legislature wanted to confine the operation of a sub-clause to the male individual only, it used the word "wife" and "husband"; where, however, the Legislature wanted to refer to either a male or a female, it used the word "individual" which, in its ordinary connotation, means either a male or a female.

For the reasons given above, I agree with the view expressed by the Allahabad and the Punjab High Courts and do not accept the interpretation given by the Madhya Pradesh High Court. In my opinion, the question should be answered in the way the Allahabad and the Punjab High Courts answered it; therefore, Civil Appeal No. 322 of 1955 should be allowed with costs and Civil Appeal No. 25 of 1955 should be dismissed with costs.

ORDER:—*By the Court*: In accordance with the Judgment of the majority Civil Appeal No. 322 of 1955 is dismissed with costs and Civil Appeal No. 25 of 1955 is allowed with costs, the referred question being answered in the negative.

C. A. No. 322 *of* 1955, *dismissed*
and C. A. No. 25 *of* 1955, *allowed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—N. H. BHAGWATI, S. K. DAS AND J. L. KAPUR, JJ.

The Oriental Investment Co., Ltd. .. *Appellant**

v.

The Commissioner of Income-tax, Bombay .. *Respondent.*

Income Tax Act (*XI of* 1922), *section* 66—*Scope*—*Duty of Appellate Tribunal to state a case and refer questions of law*—*When arises*—*Right of assessee to apply to the High Court*—*Requisite for*—*Questions of fact and of law*—*Distinction and test.*

It is the statutory duty of the Appellate Tribunal, when so required by the assessee, to draft a statement of the case and refer questions of law to the High Court, but the primary requirement is that there must be a question of law arising out of the order.

Should the Tribunal refuse to state the case as required by section 66 (1) on the ground that no question of law arises, the assessee has the right to apply under sub-section (2) to the High Court

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1. (1953) 23 I.T.R. 41.
2. (1955) 27 I.T.R. 9.

* C.A. No. 153 of 1954. 22nd May, 1957.

requiring the Tribunal to state a case and refer it to the High Court but again the essential consideration is the existence of a question of law arising out of the order.

Inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a mixed question of law and fact; and a finding of fact without evidence to support it or if based on relevant and irrelevant matters is not unassailable.

Case-law reviewed.

The limits of the boundary dividing questions of fact and questions of law were laid down in *Meenakshi Mills, Madura* v. *Commissioner of I. T., Madras*, (1957) S.C.J. 1 : (1957) 1 M.L.J. (S.C.) 1 : (1957) 1 An.W.R. (S.C.) 1 : 1956 S.C.R. 691 (726).

In the instant case, as to what are the characteristics of the business of dealing in shares or that of an investor is a mixed question of fact and law; what is the legal effect of the facts found by the Tribunal and whether as a result the assessee can be termed a dealer or investor is itself a question of law. Question of law therefore arises out of the order of the Appellate Tribunal in this case.

On Appeal by Special Leave from the Judgment and Order, dated the 15th January, 1952, of the Bombay High Court in Income Tax Application No. 54 of 1951.

R. J. Kolah, Advocate and *J. B. Dadachanji, S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain and Co.*, for Appellant.

C. K. Daphtary, Solicitor-General of India (*G. N. Joshi* and *R. H. Dhebar*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by the assessee by special leave and the question for decision is whether questions of law, if any, arise out of the order of the Appellate Tribunal.

The facts giving rise to the appeal are that the Petitioner Company was incorporated on July 29, 1924, as an investment company, the objects of which are set out in clause III of the Memorandum of Association and more particularly in sub-clauses 1, 2, 15 and 16 of that clause. The assessment years under review are 1943-44 to 1948-49, excepting the year 1947-48. According to its petition made in the High Court of Bombay, the Petitioner Company dealt with its assets as follows :

"The Petitioner Company purchased during the period 1st July, 1925 to 30th June, 1928, shares of the value of Rs. 1,86,47,789 major portion of which was comprised of shares in the Sassoon Group of Mills. During the year ended 30th June, 1929, the Petitioner Company promoted two companies known as Loyal Mills Ltd. and Hamilton Studios Ltd., and took over all their shares of the value of Rs. 10½ lacs. In the year 1930, the Petitioner Company purchased shares of Rs. 1,33,930. During the period of 9 years from 1st July, 1930 to 30th July, 1939, no purchases were made with the exception of a few shares of Loyal Mills Ltd., taken over from the staff of E.D. Sassoon & Co., Ltd., who retired from service. In the year ended 30th June, 1940, reconstruction scheme of the Appollo Mills Ltd., took place under which debentures held by the Petitioner Company in the Appollo Mills Ltd. were redeemed and the proceeds were reinvested in the new issue of shares made by the Appollo Mills Ltd. Out of the purchases of the value of Rs. 2,794 made by the Petitioner Company during the year ended 30th June, 1941, Rs. 2,000 was the value of shares of the Loyal Mills Ltd., taken over from the retiring staff. In the year ended 30th June, 1943, the Petitioner Company took over from the David Mills Co., Ltd., shares of the Associated Building Co., of the value of Rs. 56,700. After this there were no purchases at all to this date excepting purchases of the value of Rs. 34,954 during the year ended 30th June, 1946."

The sales are contained in para. 3 (*b*) which may be quoted :

"In relation to the purchases made by the Petitioner Company as stated above no appreciable sales of shares were made during the period 29th July, 1924 to 30th June, 1942, the sales made in the year ended 30th June, 1929, of the value of Rs. 1,29,333 included shares of the value of Rs. 45,000 in the Loyal Mills Ltd., sold to the members of the staff and shares of the value of Rs. 83,833 representing sterling investments handed over to the creditors of the Petitioner Company in part repayment of the loan taken from them in the year ended 30th June, 1931, shares of the value of Rs. 7,48,356 were handed over to the creditors in payment of the loan granted by them. From the year ended 30th June, 1943, E. D. Sassoon & Co., Ltd., started relinquishing the managing agencies of the various Mills under their agency and the shares held by the Petitioner Company in the Sassoon Group of Mills were handed over to the respective purchasers of the Mills agencies".

This gives the history of the acquisition and disposal of shares and also how the various transactions were entered into and why. Prior to 1940 the assessee

company made a claim every year for being treated as a dealer in investments and properties but this contention was consistently repelled and upto the assessment year 1939-40 the assessee company was assessed on the basis of being an investor but it appears that for the assessment year 1940-41 and the two following years 1941-42 and 1942-43 the Department accepting the plea of the assessee company treated it as a dealer in shares, securities and immovable properties and assessed it on that basis. For these years and for the assessment year 1943-44 the company made its return on that basis. But after the Return had been filed for the year 1943-44 the assessee company withdrew its return and filed a revised Return on March 7, 1944, contending that it was not a dealer but merely an investor. Along with the Return it filed a letter, dated March 6, 1944, in which *inter alia* it stated :

"The Return of Total Income which was submitted with the Company's letter of 25th May, 1943, was prepared in conformity with the ruling of the Income Tax Officer in the 1940-41 assessment that the company was to be assessed as a dealer in investments. Since that Return was submitted the Central Board of Revenue has decided that the Company is an Investment Holding Company and accordingly an amended Return of Total Income under section 22 (1) of the Indian Income Tax Act is submitted herewith on which the assessment for 1943-44 may be based, as on this particular question the company obviously cannot have one status for Excess Profits Tax and another for Income-tax."

It was also contended that it never carried on any business in the purchase or sale of shares, securities or properties and therefore prayed that in view of the order of the Central Board of Revenue made on its application under section 26 (1) of the Excess Profits Tax Act it should be assessed for income-tax purposes as an investor and not as a dealer.

The Income Tax Officer rejected this plea and "held the investments as the stock-in-trade of its business therein which it carried on during the 'previous year' also." The company took an appeal to the Appellate Assistant Commissioner which was dismissed and the order of the Income Tax Officer upheld. It then appealed to the Income Tax Appellate Tribunal, Bombay, where the same contentions were raised but were repelled. The Tribunal said :

"The company having itself raised the point in all the prior years that it was a dealer in investments and properties, it would appear to be difficult to understand why the company now seeks to get the position changed and desires the Income Tax Officer to treat it as if it was not dealing in shares, securities and immoveable properties."

The Tribunal after holding that the company was under no misapprehension when it claimed to be a dealer in investments in the earlier years because it was then always incurring losses and that the present contention was raised because it made "substantial profits" said :

"But we have no doubt that, according to the company's memorandum of association and its own assertions made all along in the past the assessee company is a dealer in investments and properties and the income arising to it on the sale thereof has been rightly held by the Income Tax Officer to be business profits liable to tax under the ordinary provisions of the Income Tax Act."

Thus the grounds on which the case was decided against the assessee were (1) that the assessee claimed to be a dealer or an investor according as it incurred losses or made profits and (2) that because of the objects contained in the memorandum of association and because of its assertion made in the past as being a dealer the assessee could not be held to be an investor.

The company then applied to the Appellate Tribunal under section 66 (1) of the Indian Income Tax Act for a reference of the following questions for the opinion of the High Court :

"(1) Whether on the facts and in the circumstances of the case the assessee company can rightly be treated as a dealer in investments and properties ; and

(2) Whether the profits and losses arising from the sale of shares, securities and immoveable properties of the assessee company can be taxed as business profits."

This prayer was rejected because in the opinion of the Tribunal no question of law arose out of its order. It said :

"The Tribunal did not decide this point merely because the company's memorandum of association gave power to the company to deal in investments and properties, but it was actually found that the company had dealt in investments and properties throughout and had also all along in the past asserted that it was a dealer in investments and properties."

This was more than it had said in its appellate order.

The Assessee Company then made an application under section 66 (2) of the Indian Income Tax Act for requiring the Appellate Tribunal to state the case and refer it to the High Court but this application was dismissed and then the company obtained Special Leave to appeal to this Court.

Councel for the Assessee Company contends that the questions of law arise out of the order of the Tribunal because the Tribunal has ignored the documentary evidence produced before it, has based its decision on irrelevant matters, has failed to consider crucial facts and has misdirected itself by assuming that the petitioner was a dealer from the very beginning which was contrary to the documents produced before it.

Section 66 (1) of the Income Tax Act (hereinafter termed the Act) provides that any assessee may require the Appellate Tribunal to refer to the High Court any question of law arising out of its appellate order and it is the statutory duty of the Appellate Tribunal to draft the statement of the case and refer the question of law arising out of such order to the High Court but the primary requirement is that there must be a question of law arising out of the order. Should the Tribunal refuse to state the case as required under section 66 (1) of the Act on the ground that no question of law arises, the assessee has the right to apply to the High Court requiring the Appellate Tribunal to state a case and refer it to the High Court but again the essential consideration is the existence of a question of law arising out of the order.

To draw a line between what is a question of law and what is a question of fact is not always easy. It is difficult to define this distinction which has given rise to a number of decisions, which it will be useful to discuss at this stage.

In *Stanley* v. *Gramophone and Typewriter, Limited*[1], the Master of the Rolls discussed this question as follows:

"It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held."

These observations were explained by Hamilton, J., in the *American Thread Co.* v. *Joyce*[2], as implying that by giving the material on which their finding was based the Commissioners were inviting the Court to determine whether on that material they could reasonably arrive at the conclusion on which they did arrive. The House of Lords on appeal categorically confirmed that the Courts had no jurisdiction over conclusions of fact except to see whether there was evidence to justify them and that proper legal principles had been applied.

Lord Clerk in *Californian Copper Syndicate* v. *Harris*[3], has laid down the test in the following words:

" the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making ?"

In that case the objects set out in the memorandum of association pointed distinctly to a highly speculative business and the mode of actual procedure of the company was also directed in the same direction. Taking into consideration the course of dealing of the shares by the company and also that the turning of invest-

1. (1908) 5 T.C. 358, 374.
2. (1911) 6 T.C. 1.
3. (1904) 5 T.C. 159, 166.

ment to account was not merely incidental but was an essential feature of the business, speculation being among the appointed means of the company's business the Court came to the conclusion that the company was carrying on a business.

The Lord President in a Scottish case *Cayzer Irvine and Co., Ltd.* v. *Commissioners of Inland Revenue*[1], stated the grounds on which the Court can interfere with the finding of the Commissioner as follows :

" I think we have jurisdiction to entertain the question at law, which is whether the majority of the Commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this Court in a Stated Case to review a finding in fact on the ground that there is no evidence to support it."

Lord Parker in *Farmer* v. *Trustees of the Late William Cotton*[2], after referring to the difficulty of distinguishing between a question of fact and a question of law observed :

"Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only ".

But this statement of the law was considerably modified in *Inland Revenue Commissioners* v. *Lysaght*[3], where it was held that if the issue before the Court could be described as a " question of degree " the conclusion must be a question of fact.

The *Commissioners of Inland Revenue* v. *The Korean Syndicate, Ltd.*[4], was a case where a syndicate was registered for the purpose of acquiring and working concessions and turning them to account and of investing and dealing with moneys not immediately required. The syndicate acqured part of a right to a concession in Korea and then under an agreement described as a " lease ", in consideration of receiving sums of money termed " royalties " but which were really percentages of profits made by assignee company assigned the lease to a Development company. Some moneys which were received from sale of certain shares obtained by the syndicate in exchange for shares originally acquired in the mining company were deposited in a Bank. The activities of the company were during the relevant period confined to receiving the bank interest and royalties, distributing the amount amongst its shareholders as dividend. The question for decision was whether the syndicate was carrying on a business and was therefore liable to excess profits duty. From these facts it was concluded that they were carrying on a business.

Atkinson, L.J., pointed out at page 204 that merely because a company is incorporated it does not necessarily follow that it is carrying on business. Its memorandum only shows that the company was incorporated for a particular purpose but taking into consideration the surrounding circumstances and facts of the case it was concluded that the company was carrying on a business.

In *Great Western Railway Company* v. *Bater*[5], the question for decision was whether a clerk held a public office to fall within Schedule E. It was held that the determination by the Commissioners of questions of pure fact are not to be disturbed unless it should appear that there was no evidence before them upon which they, as reasonable men, could arrive at the conclusion which they came to. Lord Atkinson said :

"What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be affected by styling the finding on a mixed question of law and fact a finding of fact."

According to the dictum of Lord Wrenbury the question for the Court was whether on the facts found and stated by the Commissioners the clerk held the office within the meaning of the Act which was a question of law.

1. (1942) 24 T.C. 491, 501.
2. L.R. (1915) A.C. 922, 932.
3. L.R. (1928) A.C. 234 ; (1928) 13 T.C. 511.
4. (1921) 12 T.C. 181.
5. (1922) 8 T.C. 231, 244.

In *Lysaght* v. *The Commissioners of Inland Revenue*[1], the question for decision was whether the assessee was a resident and ordinarily resident in United Kingdom in the year of assessment. Lord Buckmaster said :

"The distinction between questions of fact and questions of law is difficult to define,........ ....It is, of course, true that if the circumstances found by the Commissioners in the Special Case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence, and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree ; and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion."

Jones v. *Leeming*[2], was a case where the respondent with three other persons obtained an option to purchase a rubber estate in the Malay Peninsula. That estate along with another was sold at a profit. The Commissioners found that the respondent had acquired the property with the sole object of turning it over again at a profit and at no time had he the intention of holding it. This transaction was held not to be in the nature of trade nor the profits arising therefrom in the nature of income but they were accretions to capital and therefore not subject to tax under case VI of Schedule D.

In *Cameron* v. *Prendergast*[3], the following test was laid down by Viscount Maugham :

"Inferences from facts stated by the Commissioners are matters of law, and can be questioned on appeal. The same remark is true as to the construction of documents. If the Commissioners state the evidence..............................it is open to the Court to differ from such holding.

In *Bomford* v. *Osborne*[4], a farm was working as a mixed farm but as a single unit. The question for decision was whether the assessment could be apportioned one part being assessed as a farm and the other as a nursery. Viscount Simon laid down the test in the following words :

"No doubt there are many cases in which Commissioners, having had proved or admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact. In such cases, however, the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioner's conclusions".

It was also held that this question was a mixed question of law and fact.

Du Parcq, J., in *J. H. Bean* v. *Doncaster Amalgamated Collieries Ltd.*[5], held the following to be the test for determining whether the question is one of fact or law :

"Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, on this view, to have erred in point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion which there is no evidence to support is to make an error in law."

In *Edward* v. *Bairstow*[6], the respondent embarked upon a joint venture to purchase a spinning plant with the object of holding it for quick resale and at a profit. The General Commissioners found that there was no venture in the nature of trade but the Court held that the facts found led inevitably to the conclusion that the transaction was a venture in the nature of trade and that Commissioners' inference to the contrary was erroneous.

Lord Simonds observed at page 54 that:

" To say that a transaction is, or is not, an adventure in the nature of trade is to say that it has, or has not, the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics ".

At page 55 Lord Radcliffe pointed out :

"I think that it is a question of law what meaning is to be given to the words of the Income Tax Act " trade, manufacture, adventure or concern in the nature of trade " and for that matter what

1. (1928) 13 T.C. 511, 533, 534.
2. L.R. (1930) A.C. 415.
3. (1940) 2 All E.R. 35, 40.
4. (1941) 2 All E.R. 426, 430.
5. (1944) 2 All E.R. 279, 284.
6. (1955) 3 All E.R. 48, 54, 55, 57.

constitutes "profits or gains" arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the Courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear on the meaning of income."

and then at page 57 laid down the test in the following words:

"When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal."

The dicta of Warrington, L.J., in *Cooper* v. *Stubbs*[1], that intervention by a Court is proper only

"in a very clear case, where either the Commissioners have come to their conclusion without evidence which should support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law".

and of Atkin, L.J., that

"there may be a state of facts which can only lead to one conclusion of law"

were quoted with approval by Lord Radcliffe at pages 56 and 57.

A review of these authorities shows that though the English decisions began a broad definition of what are questions of law, ultimately the House of Lords decided that a "matter of degree" is a question of fact and it has also been decided that finding by the Commissioners of fact under a misapprehension of law or want of evidence to support a finding are both questions of law.

The Privy Council in *Commissioner of Income Tax* v. *Laxminarain Badridas*[2], said:

"No question of law was involved; nor is it possible to turn a mere question of fact into a question of law by asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact."

Bose J., in *Seth Suwalal Chhogalal* v. *Commissioner of Income Tax*[3], stated the test as follows:

"A fact is a fact irrespective of the evidence by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient material."

Sufficiency of evidence was explained to mean whether the Income Tax Authority considered its existence so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it exists.

The question for decision in *Dhirajlal Girdharilal* v. *Commissioner of Income-tax, Bombay*[4], was whether a Hindu Undivided Family was carrying on business in shares and it was held that this was a question of fact but if the Appellate Tribunal decided the question by taking into consideration materials which are irrelevant to the enquiry or partly relevant and partly irrelevant or based its decision partly on conjectures then in such a situation an issue of law arises, which would be subject to review by the Court and the finding given by the Tribunal would be vitiated.

The result of the authorities is that inference from fact would be a question of fact or of law according as the point for determination is one of pure fact or a mixed question of law and fact and that a finding of fact without evidence to support it or if based on relevant and irrelevant matters is not unassailable.

The limits of the boundary dividing questions of fact and questions of law were laid down by this Court in *Meenakshi Mills, Madurai* v. *Commissioner of Income Tax, Madras*[5], where the question for decision was whether certain profits made and shown in the name of certain intermediaries were in fact profits actually earned by the assessee or the intermediaries. Taking the course of dealings and the extent

1. (1925) 2 K.B. 753, 768, 772.
2. (1937) 2 M.L.J. 43 : L.R. 64 I.A. 102 : (1937) 5 I.T.R. 170, 179 (P.C.).
3. (1949) 17 I.T.R. 269, 277.
4. (1954) 26 I.T.R. 736 (S.C.).
5. (1957) S.C.J. 1 : (1957) 1 M.L.J. S.C. 1 : (1957) 1 An.W.R. (S.C.) 1 : (1956) S.C.R. 691 (S.C.).

of the transaction and the position of the intermediaries and all the evidence into consideration the Tribunal came to the conclusion that the intermediaries were dummies brought into existence by the appellant for concealing the true amount of profits and that the sales in their name were sham and fictitious and profits were actually earned by the assessee. The test laid down by this Court is to be found in the various passages in that judgment. At page 701 Venkatarama Ayyar, J., pointed out that questions of fact are not open to review by the Court unless they are unsupported by any evidence or are perverse. At page 706, it was observed :

"In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained."

The law was thus summed up at page 726 :

(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the Court under section 66 (1).

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

(3) A finding on a question of fact is open to attack under section 66 (1) as erroneous in law if there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

In the instant case the Appellate Tribunal in its appellate order has set out the amount of profits made by the Assessee Company in the years of assessment 1943-44 to 1948-49. It has also mentioned the inconsistent positions taken up by the assessee in first claiming to be a dealer and then to be an investor which according to the Tribunal was due to the fact that it was incurring losses in the earlier years and had begun making profits when the claim of being an investor was put forward. But the two basic facts on which the Tribunal has based its findings are :

(1) the objects set out in the memorandum of association of the Assessee Company ;

(2) the previous assertion by the Assessee Company that it was a dealer in investments and not merely an investor.

Counsel for the assessee relies on the decision of *Kishan Prasad's Case*[1], where this Court held that the circumstances whether a transaction is or is not within the powers of the company has no bearing on the nature of the transaction or on the question whether the profits arising therefrom are capital or revenue income and, therefore, it is contended that the Tribunal has relied upon an irrelevant circumstance. Counsel for Revenue on the other hand refer to the judgment in *Lakshminarayan Ram Gopal* v. *Government of Hyderabad*[2], where the object of an incorporated company were held not to be conclusive but relevant for the purpose of determining the nature and scope of its activities. Merely because the company has within its objects the dealing in investment in shares does not give to it the characteristics of a dealer in shares. But if other circumstances are proved it may be a relevant consideration for the purpose of determining the nature of activities of an assessee. Whether in the instant case it will have any relevance because of other materials on which the Assessee Company was relying in support of its case that it was merely an investor and not a dealer will have to be considered when the suggested questions of law are answered.

As to what are the characteristics of the business of dealing in shares or that of an investor is a mixed question of fact and law. What is the legal effect of the

1. (1954) 27 I.T.R. 49.
2. (1955) S.C.J. 595 : (1955) 1 S.C.R. 393 : (1954) 25 I.T.R. 449, 461 (S.C.).

facts found by the Tribunal and whether as a result the assessee can be termed a dealer or an investor is itself a question of law.

The questions of law that arise out of the order of the Tribunal are :

(1) Whether there are any materials on the record to support the finding of the Income Tax Officer that the Assessee Company was a dealer in shares, securities and immoveable property during the assessment year in question ?

(2) Whether the profits and losses arising from the sale of shares, securities and immoveable properties of the Assessee Company can be taxed as business profits ?

We would therefore allow this appeal, set aside the order of the High Court and remit the case to the High Court for directing the Tribunal to state a case on the aforesaid two questions. The appellant will have its costs in this Court and in the High Court for the proceedings so far taken. Further costs will be in the discretion of the High Court.

Appeal allowed. Case remitted.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, T. L. VENKATARAMA AIYAR AND J. L. KAPUR, JJ.

United Commercial Bank, Ltd., Calcutta .. *Appellant**

v.

Commissioner of Income-tax, West Bengal .. *Respondent.*

Income Tax Act (XI of 1922), sections 6, 8, 10 and 24—List of heads in section 6—Liability to and mode of taxing—" Interest on securities "—Assessee if entitled to set-off under section 24.

On a true construction of the various sections of the Income-tax Act the income of the assessee is one and the various sections 7 to 12 are modes in which the statute directs that the tax is to be levied and these sections are mutually exclusive. Thus the various heads of income in section 6 must be held to be mutually exclusive each head being specific to cover the item arising from a particular source. (Case-law discussed).

Both on precedents and on a proper construction the source of income 'interest on securities' would fall under section 8 (and not under section 10) and cannot be brought under a different head for being taxed even though the securities are being held as a trading asset in the course of its business by a banker. In this view no question of exercise of option by the assessee or the Revenue arises ; nor the rule as to choosing the head which imposes a lesser burden apply as given in *Commr. of I.-T.* v. *Basotto Bros.*, (1940) 8 I.T.R. 41 and *Kothari* v. *Commr. of I.-T., Madras*, (1951) 21 I.T.R. 579.

Quære.—Even if 'interest on securities' falls under section 8 and not under section 10 whether the assessee, is entitled to get a set-off under section 24 (2) of the Act.

In the instant case, no finding had been given that the purchase and sale of securities was also the assessee's business as receiving deposits from clients and withdrawals by them; so no opinion can be given as to whether the holding of the securities formed part of 'the same business' within section 24 (2) or not.

Appeal from the Judgment and Order, dated the 18th May, 1953, of the Calcutta High Court in Income-tax Reference No. 72 of 1951.

N. A. Palkhivala, P. D. Himatsingka, Advocates and *J. B. Dadachanji, S. N. Andley, Rameswhar Nath* and *P. L. Vohra,* Advocates of *Messrs. Rajinder Narain and Co.,* for Appellant.

G. N. Joshi and *R. H. Dhebar,* Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This appeal brought on a certificate of the High Court raises a point of far-reaching consequence as to the interpretation of sections 8, 10 and 24 (2) of the Indian Income-tax Act (hereinafter termed the Act).

The assessee (who is the appellant before us) claims that in the computation of its profits for the assessment year under review (1945-1946), it is entitled to set

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* C.A. No. 161 of 1954. 23rd May, 1957.

off the carried-over loss of the previous year against the profits of the year of assessment under section 24 (2) of the Act. The assessee is a Bank carrying on banking business. For the assessment year its assessable income was computed by the Income Tax Officer at Rs. 14,95,826 " by splitting up " its income into 2 heads . . . . . " interest on securities " and. . . . . . . " business income ". " Interest on securities " in the year of assessment was Rs. 23,6?,815 and under the head " business income " there was a loss of Rs. 8,86,972. After making the necessary adjustments and deducting the business loss from " Interest on securities ", the net income was determined at Rs. 14,95,826. In the previous year there was a loss of Rs. 3,21,929 which was computed by setting off the business loss against " interest on securities ".

Before the Income Tax Officer the assessee made its claim on the basis that it was a part of " the business of the Bank to deal in securities ". . . . . and " that no distinction should be made between income from securities and income from business for the purpose of set-off under section 24 ". It also claimed that it carried on only one business, namely, banking as defined by section 277-F of the Indian Companies Act in the course of which the " Bank has to receive money on deposits and invest such deposits in securities, loans and advances " and therefore holdings of securities by it could not be treated as its separate business. The Income Tax Officer was of the opinion that as there was a loss under the head " business " its claim could not be sustained and hence it could not be setoff under section 24 (2) of the Act.

On appeal to the Assistant Commissioner of Income Tax it was again contended that the assessee was a dealer in securities and that the two heads of income, " Interest on securities " and " profits and gains " in banking business could not be treated separately and were part of the same business of the assessee and therefore it could claim a set-off under section 24 (2) of the Act. But this contention was repelled. The matter was then taken to the Income Tax Appellate Tribunal where again the contention was repeated that the business of the assessee could not be split up into two heads under " interest on securities " and " banking business ". The Tribunal however, held :

> " Reading sections 6, 8 and 10 it appears to us that the Legislature wanted to keep the income from the two sources as separate. We are therefore of the opinion that the Income Tax Officer was right in spliting up the income of the appellant into two heads and in refusing the set-off of the business loss brought forward from last year against income from Government securities earned this year."

It therefore did not allow the loss of the previous year to be set-off against the computed profits of the assessment year.

The assessee thereupon asked for a case to be stated to the High Court and *inter alia* raised two questions ;

> (1) Whether interest on securities was a part of Bank's income from business carried on by it,
>
> (2) Whether the assessee was entitled to set-off the carried over loss of the previous year against income during the assessment year.

The assessee contended that it was carrying on banking business in various towns in India, that " in the usual course of its business it invests moneys in securities and receives interest thereon " and therefore it claimed that the loss of Rs. 3,21,929, carried forward from the previous year could be set off under section 24 (2) of the Act.

The Tribunal stated the case and sought the opinion of the High Court on the following three questions ;

> (1) "Whether on the facts and in the circumstances of this case, the assessee was entitled to set-off the business loss of Rs. 3,21,929, brought forward from the preceding year against this year's income from interest on securities held by the assessee.
>
> (2) Whether on the facts and in the circumstances of this case the assessee was entitled under section 8 to deduct any part of the administrative expenses out of the income from interest on securities.

(3) Whether in the circumstances of this case, the assessee was entitled under the first proviso to section 8 of the Income Tax Act to deduct any interest on money borrowed and utilised for investment in tax-free securities."

The High Court answered all the questions in the negative. The learned Chief Justice during the course of his judgment said :

"It appears to me, therefore, that because the several heads under section 6 in the Indian Act are mutually exclusive and because under any Income Tax Law, an item coming under an exclusive head cannot in any circumstances be charged under another head and also because the interest on securities in the hands of a banker cannot be treated as business income on the principles explained by Mr. Justice Rowlatt, I must hold that the contention of the assessee...................... must be rejected."

We had the benefit of a full and able argument from counsel on both sides. Counsel for the appellant has raised hree points ;

(1) That sections 8 and 10 of the Act should be so read that "interest on securities" in cases, where the true nature and character of the securities in the hands of an assessee is one of trading assets would be excluded from the scope of section 8 and would fall under the head "business" within section 10 of the Act,

and alternatively even if sections 8 and 10 are read as specific heads then section 10 being more appropriate should be applied to the facts of the present case;

(2) If sections 8 and 10 are equally applicable the assessee has the option to be taxed under that head which imposes a lighter burden on him ; and

(3) Lastly he contended that even if the heads of income were to be taken as mutually exclusive so that the "interest on securities" falls under section 8 and "business" under section 10 of the Act, the assessee would be entitled to a set-off under section 24 (2) because "interest on securities" and "profits and gains" from business result from different operations of the same business, the two being different forms of the same business of the assessee.

We may now turn to the scheme of the Act. Section 2 (15) defines 'total income' to mean "total amount of income, profits and gains........computed in the manner laid down in the Act". Chapter 1 of the Act deals with "Charge of Income Tax". It consists of two sections—3 and 4. Section 3 provides that "income-tax shall be charged for any year at any rate or rates in accordance with and subject to the provisions of this Act".

Section 4 provides that

"the total income of any previous year of any person includes all income, profits and gains from whatever sources derived".

Chapter 3 deals with "Taxable income". Section 6 enumerates the heads of income chargeable to income-tax. It says as under :

Section 6.—"Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing namely :—

(i) Salaries.
(ii) Interest on securities.
(iii) Income from property.
(iv) Profits and gains of business, profession or vocation.
(v) Income from other sources.
(vi) Capital gains.

The two relevant heads for the purpose of this appeal are (ii) and (iv) *i.e.*, "interest on securities" and "profits and gains of business" which are dealt with under sections 8 and 10 of the Act respectively. Section 8 provides that

"the tax shall be payable by an assessee under the head "interest on securities" in respect of interest receivable by him on any security of the Central Government............"

and in the provisos to this section are given the allowable deductions. The amendment made in the proviso by the Act of 1955 is very relevant for the purpose of this appeal and we shall advert to it at a later stage.

Section 10 provides :

"The tax shall be payable by an assessee under the head "profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation carried on by him..........."

The assessee contends that securities are a part of its trading assets and this position has throughout been accepted by the Department, and any income which accrues in respect of these assets in the form of interest has the same characteristics as profits or gains of "business" and therefore must be treated as income falling under the head "business" under section 10 of the Act. In other words the income of the assessee from its banking business which includes dealing in securities is really income from the same source and whatever accrues in the form of interest whether from securities or from any other source of investment would fall under section 10 and not section 8 because all the interest accrues from the business carried on by the assessee and this business is only one business. The argument thus is that sections 8 and 10 have to be so construed as to harmonise with each other and the only way they can be harmonised is that income accruing in the form of "interest on securities" should be taken to be accruing from the business of the assessee because securities form part of its trading assets and thus fall within section 10 and not section 8, which must be restricted to capital investments only. It is further contended that if the object of the Legislature was to give a separate and exclusive identity to the income from "interest on securities", it would have made the language of section 8 of the Act as specific as it has made in the case of income from dividends from shares, which income by the addition of sub-section (1-A) to section 12 has come to have a specific place under the head "other sources" and is no longer within the head "business" under section 10 of the Act and thus by statute its nature and character have undergone a change. Reference is in this connection made to *Commissioner of Income Tax* v. *Ahmuty & Co Ltd.*[1], where it was held by the High Court of Bombay that dividend income received by a dealer in shares is chargeable under section 10 and not under section 12 of the Act. It is thus contended that in order to preserve the unity and oneness of the business of the assessee and to maintain the unity of its business income the applicability of section 8 should be circumscribed to "interest on securities" when they are not trading assets of the assessee.

According to the scheme of the Act discussed above income-tax has to be charged in respect of the "total income" of the previous year of every assessee and "total income" is defined under section 2 (15) to comprise all income, profits and gains from whatever source derived subject to certain exemptions. Chapter 3 which is entitled "Taxable income" comprises sections 6 to 17 (both sections inclusive). Section 6 enumerates the various heads of income, profits and gains which are chargeable to income-tax. Each of these heads of income, profits and gains is dealt with under a separate section and these sections also give the details of allowances and exemptions in regard to each different head. The argument raised by counsel for the Revenue is that according to the decision of the Privy Council in *Probhat Chandra Barua* v. *The King Emperor*[2], section 6 is the charging section and that the words of sections 7 to 12 show that the various heads of income are mutually exclusive and items which specifically fall under these various heads have to be charged under only that head and would fall under one of these several but appropriately specific sections. It is true that the Privy Council in *Probhat Chandra Barua* v. *The King Emperor*[2], did point out that section 6 was a charging section, but this was because sections 3 and 4 were then differently worded as pointed out by Kania, J., in *B. M. Kamdar*, In re[3], at page 43 and by Chagla, J., in the same case at page 57. The Federal Court in *Chatturram and others* v. *Commissioner of Income Tax*[4], said :

> "The liability to pay the tax is founded on sections 3 and 4 of the Income-tax Act which are the charging sections".

The judgment of the Privy Council in *Wallace Brothers and Co. Ltd.* v. *Commissioner of Income Tax*[5], also shows section 3 to be the charging section.

1. (1955) 27 I.T.R. 69.
2. (1930) 59 M.L.J. 814 : L.R. 57 I.A. 228, 238
3. (1946) 14 I.T.R. 10.
4. (1947) 2 M.L.J. 432 (F.C.) : (1947) F.L.J. 92 : 15 I.T.R. 302, 308 (F.C.).
5. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 : (1948) F.C.R. 1 : (1948) F.L.J. 32 : (1948) 16 I.T.R. 240 (P.C.).

It is then argued that section 6 of the Act being mandatory all items of income, from whatever source they arise, would fall only under one of the heads enumerated under section 6 and therefore one of the sections 7 to 12 would specifically apply and section 8 which relates to " interest on securities " must be held to apply to income from that source. It is also contended by counsel for the Revenue that even if there is any overlapping between sections 8 and 10 " interest on securities " whether accruing from securities held as a capital asset or trading assets falls under section 8 alone and section 10 should be so read as to altogether exclude the income from " interest on securities ".

Counsel for the Revenue has referred us to the form of the Return, prescribed under section 22 (1) of the Act at the relevant time of the assessment under review. The heads there shown are: (1) Salary, (2) Interest on securities, (3) Property, (4) Business, Profession or vocation, (5) other sources and income from each source is to be shown in a separate column, in each one of which reference is made to a particular note relevant to that head of income. In the column under the head " interest on securities " reference is made to note 9 which is in the following words :

" Interest on securities " means interest on promissory notes or bonds issued by the Government of India or any other State Government or the interest on debentures or other securities issued by or on behalf of a local authority or company. The gross amount before deduction of income-tax should be entered.

Entries under this head should be accompanied by the persons paying the interest under section 18 (9) of the Act. Deductions are allowable in respect of—

(a) Commission charged by a banker for collecting the interest.

(b) Interest payable on money borrowed for the purpose of investment in the securities except certain interest payable to persons abroad from which tax has not been deducted (see section 8 of the Act for details). Full particulars (in a separate statement if necessary) should be given of any deduction claimed."

This is a statutory form and it gives what is meant by " interest on securities " what documents are to accompany the Return in order to entitle an assessee to claim refund and what deductions are to be made.

The mandatory character of section 6 is indicated by the language employed in that section and the phraseology of all the sections following, *i.e.*, 7 to 12 employing the words " the tax shall be payable under the head. . . . in respect of " the different and distinct heads of income, profits and gains, "salaries", "Interest on securities " and " property ", " business ", etc., is indicative of the intention of the Legislature making the various heads of income, profits and gains mutually exclusive. So every item of income, whatever its source, would fall under one particular head and for the purpose of computing the income for charging of income-tax the particular section dealing with that head will have to be looked at. The various sources of income, profits and gains have been so classified that the items falling under those heads become chargeable under sections 7 to 12 according as they are income of which the source is " salaries ", " interest on securities " " property", "business, profession or vocation", "other sources" or "capital gains". Looked at thus the contention of counsel for the Revenue that under the scheme of the Act and on a true construction of these relevant sections " interest on securities by whomsoever and for whatever purpose held has to be taxed under section 8 and under no other section is well founded and must be sustained. It being a specific head of chargeability of tax, income from " interest on securities " whether held as a trading asset or capital asset would have to be taxed under section 8 and not under section 10 of the Act.

The amendment made in the proviso to section 8 in the year 1955 allowing a deduction in respect of any remuneration paid to any person other than the banker for realising interest on behalf of the assessee, supports this interpretation. Thus this proviso now provides that reasonable amount can be deducted by an assessee for commission paid to a Bank or remuneration paid to any body else for realising interest on its behalf which clearly indicates the intention of the Legislature that

interest on securities specifically falls under section 8 and under no other section. This amendment shows that even a Bank, if it buys securities as a part of its trading assets, is entitled to make a deduction for remuneration paid by it to any person for realising interest which postulates that "interest on securities" would fall under section 8 of the Act.

This interpretation receives further support from the language of section 18 which deals with payment after deduction at source. Section 18 (3) requires a person responsible for paying "interest on securities" to deduct income-tax on the amount of the interest payable at the maximum rate and the person so responsible is required, after deduction of the income-tax to pay to the account of the Central Government within 7 days of the deduction, the sum so deducted and under section 18 (5) the maximum rate is to be charged for the year in which the amount is paid and not at the rate of the assessment year.

A combined reading of sections 3, 4, 6, 8, 10, 18 and refund section, section 48 shows that income-tax is to be charged at the rate or rates prescribed in the Finance Act on the total income of the assessee as defined in section 2 (15) of the Act and computed in the manner given in sections 7 to 12 which are not charging sections but are provisions for the computation of "total income". In the words of Viscount Dunedin in *Salisbury House Estate* v. *Fry*[1]:

"Now, the cardinal consideration in my judgment is that the income-tax in only one tax, a tax on the income of the person whom it is sought to assess, and that the different schedules are modes in which the Statute directs this to be levied".

As has been pointed out in that judgment there are no separate taxes under the various schedules but only one tax. But in order to arrive at the total income on which tax is to be charged "you have to consider the nature the constituent parts, of his (assessee's) income to see which schedule you are to apply." If these words may be used with reference to the language of the Indian Act, we have to look at the source of "income, profits and gains" and then see under what head it appropriately and specifically falls and if it falls under one particular head then computation is to be made under the section which covers that particular head of income. We cannot treat any one of the sections from sections 7 to 10 to be general or specific for the purpose of any one particular source of income. The language shows that they are all specific and deal with the various heads in which the item of income, profits and gains in the case of an assessee falls.

Sir George Rankin in *Commissioner of Income Tax* v. *Chunnilal B. Mehta*[2], said :

"The effect of section 6 is to classify profits and gains under different heads for the purpose of providing for each appropriate rules for computing the amount ; its language is "shall be chargeable . . . . in the manner hereinafter appearing"

One of the heads is "business", which as a head of income stands alongside salaries, interest on securities, professional earning and other sources. True the classification of income is according to the character of the source. . . . . But the list of "heads" in section 6 is a list of sources not in the sense of attributing the income to one property rather than another, one business rather than another but only in the sense of attributing it to property as distinct from employment, or business as distinct from investment . . . .

. . . . . What is to be learnt from an examination of the language of sub-section (1) of section 4—income, profits and gains described or comprised in section 6 from whatever source derived —is that section 6 is intended as describing different kinds of profits. . . . ."

In that case the question for decision was whether a resident carrying on business in India and controlling transactions abroad in the course of such business was liable to income-tax on such transactions, it was held that the profits arising under such transactions do not arise or accrue in India merely because of control by the assessee in India. The judgment of the Privy Council shows what section 6 of the Act means—each head refers to income, profits and gains attributable to the source—Salary, interest on securities, property, business, profession, etc. This supports the contention of each head being separate, exclusive and specific.

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1. (1930) 15 T.C. 266, 306. 6 I.T.R. 521, 529 (P.C.).
2. L.R. 65 I.A. 332 : I.L.R. (1938) Bom, 782:

Decided cases all support the contention of counsel for the Revenue that the various heads of income enumerated in section 6 of the Act and more particularly dealt with in sections 7 to 12 are exclusive heads and if an item of income falls under one of these heads then it has to be treated for the purpose of income-tax under that head and no other. In *Salisbury House Estate Ltd.* v. *Fry*[1], the assessee was a limited company which was formed for the express purpose of acquiring Salisbury House and utilising it. In this building there were 800 rooms which were let to tenants. The company also maintained a staff of servants to render various kinds of services to the occupants of the rooms. The company was assessed to income-tax under Schedule A upon gross valuation of the premises and as the actual rent received was higher the Revenue wanted to assess income again under Schedule D. The company contended that so far as the proceeds of the property were concerned they had already been taxed under Schedule A and could not again be brought " in computo " under Schedule D.

Viscount Dunedin at page 306 observed :

" Now, if the income of the assessee consists in part of real property you are, under the Statute, bound to apply Schedule A ".

Lord Atkin at page 319 said :

" the dominance of each Schedule A, B, C and E over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income, dealing with allowances and exemptions, with the mode of assessment, and with the officials whose duty it is to make assessment. . . . . . . I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject-matter of the other specific Schedules."

At page 320, he pointed out that Schedule D is a residuary Schedule and all Schedules are mutually exclusive. Referring to investments in securities he said:

" Income derived by a trading company from investment of its funds, whether temporary or permanent, in Government securities must be taxed under Schedule C, and cannot for the purpose of assessment under Schedule D be brought into account."

This shows that even though Schedule D is residual all Schedules are mutually exclusive and if income falls under one Schedule, it must be assessed under that Schedule because the Schedules are a complete code for each class of income, dealing with allowances and exemptions and with the mode of assessment. A significant passage in the judgment of Lord Atkin is :

" I find it difficult to say that companies which acquire and let houses for the purpose of their trade, such as breweries in respect of their tied tenants, and collieries and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading. Personally I prefer to say that even if they do trade in letting houses their income so far as it is derived from that part of their trading must be taxed under Schedule A and not Schedule D ".

Thus even though the assessee was a company carrying on business or trade, income from the head " property " was taxed under Schedule A and not Schedule D. This case supports the contention that different Schedules being distinctly applicable to each individual head of income would exclude the applicability of any other head.

In *Butler* v. *The Mortgage Company of Egypt Ltd.*[2], a British company controlled in Egypt was carrying on business of lending money on mortgage of land in Egypt or on the security of debentures by mortgage of land. In case of default the bank could take action in the Egyptian Courts either to sell the property or to take possession with a view to future sale. The General Commissioners held that the acceptance of securities for money lent was only an incident of the company's business and that income was not assessable under case 4 of Schedule D. The company claimed that the assessment should be under case 5 of Schedule D and not case 4. It was held that the Crown had the right to tax under case 4 but even if the assessee satisfies that case 5 is also applicable it was still for the Crown to decide and tax under case 4 provided both cases applied equally. Rowlatt, J., said :

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1. (1930) 15 T.C. 266.
2. (1928) 13 T.C. 803, 809, 810.

"A banker could never ask to be repaid the tax which had been deducted from the Government securities which he held, because he held them as a banker, the point being that when you have once got a security (we will say) the interest on which is taxed by the Act, you cannot get out of it because you say that you look a little further and see this is only embedded in a business".

It means in terms of the Indian Statute that in the case of interest on securities if chargeable under a specific section, the assessee even though he is a banker cannot claim that they be treated as "business income."

In *Thompson* v. *The Trust and Loan Company of Canada*[1], the respondent company carried on business as a loan and finance company. During the material years the company bought treasury bonds-cum-coupons and on the same day sold bonds of the same nominal value retaining the coupons and received on encashment a half year's interest under deduction of income-tax. The Crown contended that in computing the Company's profits for assessment to income-tax under case 1 of Schedule D there should be included, as receipts, the amounts realised by the sale of bonds ex-coupons and the net proceeds of the coupons and as disbursements, the amounts paid by the company for the bonds-cum-coupons. But it was held that the interest received by the Company was income of the company taxed by deduction under Schedule C and that no part of the proceeds of the coupons should be included in the computation of the company's liability under Schedule D. Rowlatt, J., at page 400 said:

"The Crown cannot treat a transaction which has its own character for income-tax purposes as if it were something of a different character . . . . . ."

and Lord Hanworth, M.R. at page 406 put the matter thus :

"Now in the present case it is plain that this subject-matter of tax, government bonds and coupons payable out of the government funds, have got to be taxed under Schedule C ; they cannot be taxed anywhere else."

In Volume I of Simon's Income-Tax, (1948) Ed., page 54, the law is thus stated :

"These Schedules are *prima facie* mutually exclusive and consequently if a particular kind of income is charged under one Schedule the Crown cannot elect to charge it under another."

This is in accord with the decisions discussed above.

The *Commercial Properties Ltd.* v. *Commissioner of Income Tax, Bengal*[2], was a case of a registered company whose sole object was to acquire lands, build houses and let them to tenants, the sole business of the company being the management and collection of rents from the properties. The assessment was made under section 9 of the Act but the company claimed that they were carrying on a business assessable under section 10 and not under section 9. The Court held that the company was rightly assessed under section 9, its income being derived from its ownership of buildings. Rankin, C.J., said at page 26 :

"In my judgment the words of section 6 and section 9 and section 10 must be read so as to give some effect to the contrast that is there made between income, profits and gains from "property" and from "business"; and I entirely refuse my assent to the proposition that because it happens that the owner of a property is a company which has been incorporated for the purpose of owning such property, therefore the income derived from "property" must be regarded as income derived from "business". In my judgment, income derived from "property" is a more specific category applicable to the present case".

The decision in this case shows that the ownership of the house property was not considered as "business" and that income derived from such source would more specifically and appropriately fall within the head "property".

The applicability of section 8 directly arose and was discussed in *H. C. Kothari* v. *Commissioner of Income Tax, Madras*[3]. The assessees in that case had several sources of income, one of which was interest on securities. The business of the assessees showed a loss but the assessees claimed earned income relief in respect of interest on securities on the ground that securities which they had purchased and sold as part of their business, formed their stock-in-trade and the interest therefrom should be trea-

1. (1932) 16 T.C. 394.
2. (1928) 3 I.T.C. 23.
3. (1951) 20 I.T.R. 579, 587.

ted as "business" profits. But section 8 of the Act was held applicable to the facts of that case. Satyanarayana Rao, J., said:

". . . . . it seems to us obvious that section 8 of the Act which deals with interest on securities is a separate and distinct head, and if an income is chargeable under that head, it is not open either to the assessee or to the department to change the head and claim to tax it under a different head. . . . ."

It was also pointed out in this judgment following the *Commissioner of Income Tax* v. *Bosotto Bros.*,[1] that if income falls under more than one head the assessee has the option to choose the head which makes the burden on his shoulders lighter.

The following two cases were relied upon by the assessee: (1) *Mangalagiri Sri Umamaheshwari Gin and Rice Factory Ltd.* v. *Guntur Merchants Gin and Rice Factory Ltd.*,[2] where a limited company incorporated for the purpose of milling rice leased out the buildings, plant, machinery, etc., to another company for a fixed annual rent. The lessees were to do the necessary repairs to keep the mill in good working condition and the lessors were to bear the loss of depreciation. The assessee company claimed the allowances for depreciation under section 10 (2) (*vi*) of the Act. It was held that the company was carrying on the business of letting a rice mill and as such was entitled to a deduction for depreciation. The judgment of Krishnan, J., shows that it was clear from the facts of the case that the company was carrying on business of letting the mill for the purpose of being worked by lessees and it was under these circumstances that section 10 was held applicable. The other case is *Sadhacharan Roy Chowdhury*, In re[3], the facts of which were similar to the facts of *Mangalgiri Sri Umamaheshwari Gin and Rice Factory Ltd.* v. *Guntur Merchants Gin and Rice Factory Ltd.*[2] It was held that letting of a Jute Press at rent was as much a business as the letting of a ship to freight or letting of motor-car or any other kind of machines or machinery for hire, and therefore allowances for depreciation were allowed like in *Mangalagiri's case*[2]. Neither of these cases throws any light on the question now before us.

The appellant's contention that looking at the real nature and character of the source of income arising from "interest on securities" in the case of the present assessee, the Bank can receive no support from the decision in *Davies* v. *Braithwaite*[4]. That was a case where an actress earned her living by accepting and fulfilling professional engagements, her actvities being acting in stage-plays in England and America, performing for the films and on the wireless and performing for gramophone companies. These were held to fall under Schedule D and not E as whatever contracts she made were nothing but sti incidenn the conduct of her professional career. The use of the following words by Sir George Rankin in *Commissioner of Income Tax* v. *Chunnilal B. Metha*[5].

"But the list of "heads" in section 6 is a list of sources not in the sense of attributing the income to . . . . one business rather than another but only in the sense of attributing it to . . . . business as distinct from investmnet. . . . ."

is no surer foundation for saying that "interest on securities" is severable into income from securities held as a capital investment and income from those held as trading assets. The language of sections 6, 8 and 10 is destructive of any such contention.

Thus on a true construction of the various sections of the Act the income of an assessee is one and the various sections 7 to 12 are modes in which the Statute directs that income-tax is to be levied and these sections are mutually exclusive. The head of income of which the source is "interest on securities" has its characteristics for income-tax purposes and falls under the specific head covered by section 8 of the Act, and where an item falls specifically under one head it has to be charged under that head and no other. This interpretation follows from the words used in

1. (1940) 1 M.L.J. 319 : I.L.R. (1940) Mad. 178 : 8 I.T.R. 41.
2. (1926) 51 M.L.J. 360 : 2 I.T.C. 251.
3. (1935) 3 I.T.R. 114.
4. (1931) 2 K.B. 628.
5. L.R. 65 I.A. 332 : I.L.R. (1938) Bom. 752 : 6 I.T.R. 521, 529 (P.C.).

sections 6, 8 and 10 which must be read so as to give effect to the contrast between "income, profits and gains" chargeable under the head "interest on securities" and "income, profits and gains" chargeable under the head "business". Thus on this construction the various heads of "income, profits and gains" must be held to be mutually exclusive, each head being specific to cover the item arising from a particular source. It cannot, therefore, be said that qua the assessee in the present case and for the purpose of securities held by it section 8 is more specific and section 10 general or *vice-versa*, and therefore no question of the applicability of the principle "*generalia specialibus non-derogant*" arises. This finds support from the decided cases which have been discussed above. Thus both on precedent and on a proper construction, the source of income "interest on securities" would fall under section 8 and not under section 10 as it is specifically made chargeable under the distinct head "interest on securities" falling under section 8 of Act and cannot be brought under a different head even though the securities are held as a trading asset in the course of its business by a banker. In this view of the matter no question of exercise of option by the assessee or the Revenue arises. Consequently Lord Shaw's observation in *Liverpool and Land & Globe Insurance* v. *Bennett*[1] :

> "It appears to me that this selection is not only justified in law but is founded upon the soundest and most elementary principles of business,"

will be inapplicable to the facts of the present case, and so also the rule as to choosing the head which imposes on the assessee's shoulders burden which is lighter as given in *Commissioner of Income-tax* v. *Bosotto Bros.*[2], and reiterated in *H. C. Kothari* v. *Commissioner of Income-tax, Madras*[3].

To the third point raised by counsel for the assessee that even if interest on securities falls under section 8 of the Act and not under section 10 the assessee is entitled to get a set-off under section 24 (2) of the Act, counsel for the Revenue has taken the objection that this plea is not available to the appellant because it was not placed before the Income Tax Appellate Tribunal for being referred to the High Court nor was it raised before the High Court. How the question was specifically raised before the Income Tax Officer and the Appellate Assistant Commissioner and also before the Income Tax Appellate Tribunal has already been mentioned. In its application to the Tribunal for stating the case to the High Court the assessee specifically raised in two suggested questions its right to set off the business loss of Rs. 3,21,929 brought forward from the previous year against the income of the assessee in the assessment year. It does not appear from the judgment of the High Court that the question was argued in the manner it has been debated in this Court. The appellant seems to have rested his case on the applicability of section 10 to the profits under the head "interest on securities" because of the securities being trading assets but this contention was repelled and the same question has been raised before us but the assessee now supports his case on an alternative argument that even if the securities fall under section 8 still the profits from that source are from an item of the assessee's business and therefore the loss of the previous year from the banking business of the assessee can be set off against the profits of the assessment year whatever be the source of that profit. The case is similar to the one in *Commissioner of Income-tax* v. *Messrs. Ogale Glass Works Ltd.*[4] The question framed by the Tribunal is a general one and what is to be determined as whether the loss of the previous year can be set off against the income of the assessment year within the provisions of section 24 (2) of the Act. The question is wide enough to cover the point raised before us. In the circumstances of this case the third point, raised by counsel for the assessee, is open to be canvassed before us.

Counsel for the Revenue contends that the words used in sub-section 24 (2) were "the same business" and therefore this set-off would be allowable only against

1. (1913) 6 I.T.C. 327, 376.
2. (1940) 1 M.L.J. 319 : I.L.R. (1940) Mad. 178 : 8 I.T.R. 41.
3. (1951) 20 I.T.R. 579, 587.
4. (1955) 1 S.C.R. 185, 196, 198 : (1954) S.C.J. 522 : (1952) 2 M.L.J. 67.

any profits or gains of the same business and no other business. He further contends that the scheme of section 24 (1) and (2) shows that profits and gains must be arising under section 10 and not under any other section because the expression used is profits or gains which goes with "business" under section 10 and cannot have reference to income, profits and gains arising from "interest on securities" which are under section 8 of the Act.

Counsel for the assessee on the other hand submits that the use of the word "same" signifies the identity of the business in which the loss has occurred and has no reference to the head under which the profits are chargeable. In other words interest does not cease to be profits and gains of the same business merely because for the purpose of chargeability it falls under a different head, *i.e.*, under section 8 and not under section 10. Section 24 of the Act deals with the set off of loss in computing the aggregate income.

He also contends that the business which the assessee was carrying on was the business of dealing in money and credit and that banking and dealing in securities constitute one and the same business. He refers to section 277-F of the Indian Companies Act and relies on the Privy Council decision in *Punjab Co-operative Bank Ltd.* v. *The Commissioner of Income-Tax*[1], in which it was pointed out that in the ordinary case of a bank the business consists in its essence of dealing with money and credit. The banker has always to keep enough cash or easily realisable securities to meet any probable demand by depositors, and if some of the securities are realised to meet withdrawals by depositors, this is clearly a normal step in carrying on the banking business. It is an act done in what is truly the carrying on of the banking business.

In view of the order we propose to make, we do not find it necessary to express any opinion on the respective contentions raised by counsel for the parties. In *Punjab Co-operative Bank's case*[2] a finding had been given that the purchase and sale of securities was as much the assessee's business as receiving deposits from clients and withdrawals by them. In the case before us no such finding has been given and in the absence of such finding no opinion can be given as to whether the holding of securities out of which interest was derived formed part of the same business within section 24 (2) or not.

The appeal would, therefore, be allowed and the case remitted to the High Court for a fresh decision of the reference after getting from the Tribunal a fuller Statement of Facts about this part of the case, whether the securities in question were a part of the trading assets held by the assessee in the course of its business as a banker.

The costs of this appeal will be costs in the reference before the High Court.

Appeal allowed; case remitted.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. JAGANNADHADAS, B. P. SINHA AND P. GOVINDA MENON, JJ.

AL. PR. Ranganathan Chettiar and another .. *Appellants**

v.

Al. PR. AL. Periakaruppan Chettiar and others .. *Respondents.*

Hindu Will—Disposition to A as the adopted son—Adoption invalid—If takes effect.

Deed—Construction—Trusteeship, if created by the words 'invested in the name of A to the order of P and C'—P, if liable to A as a trustee.

Where in the dispositive clause under a *will* the testator referred to *R* as "my adopted son Ranganathan" though in other clauses he was referred to as "Ranganatha" and it was contended that the validity of adoption was the condition for the disposition to take effect,

1. (1941) 1 M.L.J. 130 : L.R. 67 I.A. 464 : (1940) 8 I.T.R. 635 (P.C.).

2. (1941) 1 M.L.J. 130 : L.R. 67 I.A. 464 : (1940) 8 I.T.R. 635 (P.C.).

*Civil Appeal No. 104 of 1954 and Civil Appeal No. 169 of 1956. 24th May, 1957.

Held : The question as to whether a disposition in such terms is to the person intended as a *persona designata* or by reason of his filling a particular legal status, arising in individual cases, must ultimately depend on its own facts and the terms of the particular document containing the disposition.

In the instant case the 'customary adoption' set up by the testator was made for temporal rather than spiritual purposes; taking an overall picture of the various provisions of the *will*, the exclusion of the validly adopted son and his heirs from succession, the conduct of parties for a long period to over 14 years allowing *R* to retain the properties and the intention of the testator, it was held that if was reasonably clear that *R* notwithstanding his description as adopted son in the *will* was intended to take as *persona designata* and the *will* was effective to convey title to him.

Nidhoomani Debya v. *Saroda Pershad Mookerjee*, (1876) L.R. 3 I.A. 213 : and *Fanindra Deb Raikat* v. *Rajeswara Das*, (1884) L.R. 12 I.A. 72 (89) relied.

Where under a rajinama in a suit reciting, *P* was directed by panchayatdars and he agreed to pay *A* and issued hundies detailed in the rajinama itself and it was made an order of Court, and where clause 3 of the rajinama recited that certain moneys due under the hundies (on realisation) "shall be invested in Chetti houses in the name of the second plaintiff (*A*), to the order of *P* and *C* and it was contended that *P* and *C* were constituted trustees as they were to be in management (*irwargalum mel parthu varavandiathu*) :

Held : Undoubtedly paragraph 3 of the rajinama indicates that the amounts (on realisation) was to be deposited to the *order* of *P* and *C* and that both together are to have '*mel parvai*.' (supervision) But whatever may be the connotation of the provision it is not reasonable to attribute to *P* the undertaking of the responsibility of a trustee on its basis ; the rajinama and the hundies must be construed together. Trusteeship is a position which is to be imputed to a person on a clear and conclusive evidence of transfer of ownership and of the liability attached to such ownership on account of the confidence reposed and on such liability having been accepted by the alleged trustee. The mere fact that *P* agreed to all the terms of the *rajinama* does not constitute such acceptance.

The burden is on the plaintiff *A* to make out clearly that by the *rajinama*, *P* became a trustee for the fund and incurred liability for *C's* breach ; this has not been made out.

Appeal by Special Leave from the Judgment and Decreed, dated the 13th November, 1950, of the Madras High Court in A.S. No. 484 of 1947 arising out of the Judgment and Decree, dated 21st December, 1946, of the Court of the Subordinate Judge, Devakottai, in Original Suit No. 156 of 1944 and Appeal from the Judgment and Decree, dated 17th September, 1952/24th October, 1952, of the Madras High Court in A.S. No. 243 of 1947 arising out of the Judgment and Decree, dated 21st Decemher, 1946, of the Court of the Sub-Judge, Devakottai, in Original Suit No. 164 of 1944.

A. V. Vishwanatha Sastri, Senior Advocate, (*M. S. K. Aiyangar* in C. A. No. 104 of 1954 and *M. S. K. Sastri* in C. A. No. 169 of 1956, Advocates with him), for Appellants.

K. S. Krishnaswamy Iyengar, Senior Advocate, (*R. Ganapathy Iyer*, Advocate with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Jagannadhadas, J.—These two are appeals against two separate decrees of the High Court of Madras arising out of two suits as between the same contesting parties with reference to a connected set of facts. Civil Appeal No. 104 of 1954 is before us by virtue of special leave granted by this Court under Article 136 (1) of the Constitution. Civil Appeal No. 169 of 1956 has come up by reason of certificate granted by the High Court under Article 133 (1) (*a*) of the Constitution. The parties to the litigation are Nattukottai Chetties, a wealthy banking community in South India who, at the time, were having large banking transactions in Burma and other places in South-East Asia. One AL. PR. Periakaruppan Chettiar (hereinafter referred to as Periakaruppa) owned and possessed considerable properties. He adopted one AL. PR. Alagappa Chettiar (hereinafter referred to as Alagappa) in or about the year 1914. There arose acute differences between them from about the year 1924 owing to the alleged wasteful habits of Alagappa who ran into debts. This led to criminal complaints between them, each against the other, in 1926. (*See* Exhibits P-5 and D-12). One of Alagappa's creditors obtained a decree against him and attached Alagappa's half share in the family

residential house including the site on which it was situated. This resulted in a regular suit in which the question at issue was whether the site was ancestral site and whether the super-structure was constructed out of the ancestral funds. It was found that the site was ancestral. Periakaruppa maintained that the super structure which was substantial in value compared with the site was built out of his self-acquired funds and was not joint family property, while Alagappa and the attaching creditor contended to the contrary. The litigation went up to the High Court and the High Court accepted the contention of Periakaruppa and made a declaration that the site was ancestral and that the super-structure was the self-acquisition of Periakaruppa. The judgment of the High Court was dated November 19, 1926, and is reported in *Periakaruppan* v. *Arunachalam*[1]. During the pendency of this litigation in the High Court the adopted son Alagappa filed a suit on September 9, 1926, on behalf of himself and his minor son by name AL. PR. AL. Periakaruppan Chettiar, (hereinafter for distinction, referred to as junior Periakaruppa) represented by his mother and next friend by name Muthayi Achi. It has to be mentioned that in or about June 27, 1926, Periakaruppa purported to make a second adoption of a young boy by name AL. PR. Ranganathan Chettiar (hereinafter referred to as Ranganatha) on the footing that such an adoption was permitted by special custom in Nattukottai Chetti families. The Suit O.S. No. 114 of 1926 filed by Alagappa and his minor son, junior Periakaruppa, was therefore filed as against Periakaruppa and his second adopted son Ranganatha, who at the time was also a minor. It was for delivery of a half share of the properties of the family on the footing that all the properties were joint family properties and for a declaration that the second adoption was invalid. The first defendant therein, Periakaruppa, filed a written-statement contesting both these matters and claiming that all the suit properties in their entirety were his self-acquisition and that the plaintiffs had absolutely no rights therein and also asserting that the second adoption was valid. Before the suit proceeded to the stage of issues and trial, the dispute between the parties was compromised by a *Rajinama* brought about by four *Panchayatdars*, who are all respectable members of the Nattukotti Chetti community. Some of the questions that arise in the present appeals centre round the proper construction of some of the terms of this *Rajinama*, which will be noticed later. It is sufficient to state at this stage that by that *Rajinama* the two plaintiffs, Alagappa and his minor son, Junior Periakaruppa, obtained Rs. 75,000 each and Alagappa's wife Muthayi Achi, the mother of the minor son and his next friend in the suit, was to get a sum of Rs. 14,000 as her *Stridhan*. These amounts were paid by means of four hundis, Rs. 25,000 and Rs. 50,000 for Alagappa, Rs. 75,000 for junior Periakaruppa and Rs. 14,000 for the mother, Muthayi Achi on Nattukottai Chetti Bankers of Periakaruppa in Burma. It was one of the express terms of the *Rajinama* that all the properties mentioned in the plaint in that suit and other properties belonging to the first defendant, Periakaruppa, were admitted to be his self-acquisitions and that the plaintiffs therein had no right and connection whatsoever in any of them or in the charities founded by Periakaruppa and in the properties belonging thereto or their management, either in the life time of Periakaruppa or subsequent thereto. It was also one of the specific terms of the *Rajinama* that the plaintiffs should remove themselves from the family house with all their belongings and that the possession of the aforesaid house be delivered to Periakaruppa. It was also expressly stipulated that the petition then pending for leave to appeal to the Privy Council against the judgment reported in *Periakaruppan* v. *Arunachalam*[1], was to be withdrawn. This compromise was certified to be for the benefit of the minor plaintiff concerned, as also of the minor defendant Ranganatha and was accepted by the Subordinate Judge before whom the compromise petition was filed. As a result, the compromise was accepted by the Court on August 15, 1927, and the suit was dismissed in terms thereof on the same date. About an year and a half later Periakaruppa executed a will on April 4, 1929. The genuineness and due execution thereof are not in question. But the effect of that will is also one of the main points

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1. (1926) I.L.R. 50 Mad. 582 : 52 M.L.J. 571.

in dispute. Periakaruppa died about three months later, *i.e.*, on July 14, 1929, and his wife Lakshmi Achi died within an year thereof on March 11, 1930. By the will, broadly speaking, Periakaruppa made arrangements for certain religious gifts and charities and made arrangements for the management thereof and gave the residue of the property to his wife Lakshmi Achi for her life and thereafter to his second adopted son Ranganatha. Ranganatha, who, some time in or about the date of Lakshmi Achi's death in 1930, appears to have attained majority, has been in undisputed possession and enjoyment of Periakaruppa's properties ever since till late in 1944. Alagappa's son junior Periakaruppa attained majority in December, 1943, and filed two suits on November 11, 1944, in the Subordinate Judge's Court of Devakottai, one numbered as O.S. No. 156 of 1944 and the other as O.S. No. 160 of 1944. O.S. No. 156 of 1944 was on the footing that Rs. 75,000 which was given to him under the above-mentioned *Rajinama* of the year 1927, was, under the terms thereof constituted a trust for his benefit during his minority under the trusteeship of Periakaruppa himself and another person A.P.S. Chockalingam Chettiar of Athangudi, (hereinafter referred to as Chockalingam) the junior paternal uncle of the minor's mother, Muthayi Achi, and that the money was wrongly appropriated by Chockalingam owing to his straightened circumstances. His case was that Periakaruppa as a co-trustee with Chockalingam was equally responsible for breach of the trust and that therefore he was entitled to have the money found due on account, paid out of the estate of Periakaruppa in the hands of Ranganatha as well as from the estate of Chockalingam in the hands of his son. The second suit O.S. No. 164 of 1944 was a suit to recover the entire properties of Periakaruppa in the possession of Ranganatha for himself and his father Alagappa who was made the first defendant in the suit, on the ground that Ranganatha's adoption was invalid, that the will of Periakaruppa was ineffective and that the properties devolved on himself and his father Alagappa. It may be noticed that so far as the father Alagappa is concerned the suit would *prima facie* be time barred since it has been filed about 15 years after the death of Periakaruppa. The plaintiff junior Periakaruppa, however, filed the suit on the footing that in view of his minority for all this period until December, 1943, the suit was not barred. Hereinafter, for convenience, the first suit O.S. No. 156 of 1944 will be referred to as the trust suit, and the second suit O.S. No. 164 of 1944 will be referred to as the succession suit.

In the succession suit the main questions that arose for decision were :

(1) whether the adoption of Ranganatha as a second adopted son was valid ;

(2) if not, whether the will was effective to convey the property of Periakaruppa to Ranganatha after the death of his wife Lakshmi Achi, notwithstanding the invalidity of his adoption ;

(3) whether, in case the will was ineffective the properties of Periakaruppa devolved on both Alagappa and his son junior Periakaruppa together or on Alagappa alone to the exclusion of junior Periakaruppa ;

(4) if the devolution was on both together, whether the rights of junior Periakaruppa were barred by reason of section 7 of the Indian Limitation Act (IX of 1908). This involved the further questions

(*a*) whether by and under the *Rajinama* Alagappa and his son became divided in status *inter se* so as to make section 7 inapplicable.

(*b*) whether in case the devolution was on both together as members of a joint family, section 7 had application to the factual situation in the family.

So far as the adoption of Ranganatha was concerned both the Courts below, while holding that the adoption as a fact was proved, have found against existence of the custom pleaded as to its validity and hence concurrently found the adoption to be invalid. That conclusion is no longer in dispute in this Court. As regards the will both the Courts held that the will was ineffective to vest any title in Ranganatha though on slightly different grounds. As regards question No. 4 relating to limitation, the two Courts came to different conclusions with the result that the trial Court dismissed the suit as barred by limitation, while the High Court reversed it and granted a decree for the half share of Periakaruppa's properties in favour of junior Periakaruppa holding that in respect of the other half share the rights of Alagappa were

barred and that Ranganatha acquired the same by his adverse possession. As regards question No. 3 and the subordinate questions (*a*) and (*b*) of question No. 4, there appears to have been no serious question raised in the trial Court by the defendant as to the exclusion of junior Periakaruppa by Alagappa in the matter of succession to Periakaruppa's properties, or any serious questions raised by the plaintiff as to the *Rajinama* bringing about a partition *inter se* between the father Alagappa and his minor son junior Periakaruppa and of Alagappa not being the *de facto* manager of the family. It was accordingly found by the trial Court that both of them succeeded as members of the joint family and that therefore the minor junior Periakaruppa, was barred by virtue of section 7 of the Limitation Act. When the matter came up on appeal to the High Court, a question was raised that section 7 would not be applicable in this case unless it was further made out that the father Alagappa was the *de facto* manager of the family consisting of himself and his minor son of which it is alleged there was no proof or finding. Both the Judges allowed this point to be raised and called upon the trial Court to take evidence and submit a finding in respect of that contention. The trial Court accordingly took evidence in regard thereto and returned a finding that on the evidence, both the father and the minor son were living as members of a joint family and that the father was in fact the *de facto* guardian. When the matter was reheard by the same Bench of the High Court on the return of the finding, the Bench did not go into the correctness or otherwise of this finding, on the view that this finding was of no consequence, if it is found that by virtue of the *Rajinama* both the father and the minor son became divided *inter se*. The learned Judges while realising that the finding was called for on the undisputed assumption that the father and the son were undivided in status, were of the opinion that there was nothing to prevent them from reopening the same and held on a construction of the *Rajinama* that it brought about divided status *inter se* between the father Alagappa and his minor son junior Periakaruppa. In that view they found section 7 of the Limitation Act had no application to the case and came to the conclusion that the succession suit by junior Periakaruppa was not barred by limitation in so far as it related to his own share though barred in respect of Alagappa's share. Hence the succession suit ended in favour of junior Periakaruppa in respect of a half share of the properties left by Periakaruppa.

As regards the trust suit the contentions raised were :

(1) that under the *Rajinama* both Periakaruppa and Chockalingam became trustees in respect of the sum of Rs. 75,000 to be invested in Chetti firms as provided in the *Rajinama* ;

(2) that as a fact the amount was invested with Chockalingam, one of the trustees themselves, contrary to the law ;

(3) that such investment itself constituted breach of trust for which Periakaruppa was also responsible.

It appeared on the evidence that out of the trust amount, a sum of Rs. 30,000, was invested in the purchase of a house at Athangudi in South India (the place of Chockalingam) and that Alagappa and his minor son, the junior Perikaruppa and his family have been since that purchase on July 23, 1928, living in that house. At the trial, therefore, credit was given to this amount as being proper investment of the trust funds in the matter of account-taking by concession of the lawyer for junior Periakaruppa. The defendant Ranganatha in addition to contending that no trust was created, also contended that as a result of subsequent transactions junior Periakaruppan got the benefit not only of the purschase of the house above referred to but also of a mortgage executed in favour of himself and another by Chockalingam in 1930 for a lakh of rupees of which Rs. 70,000 was his of which he obtained the benefit and that, therefore, the alleged breach of trust must be taken to have been waived and that in any case he was entitled to have the mortgage document as much as the purchase of the house to be taken into consideration for reducing his liability in respect of the alleged breach of trust. These contentions were negatived by both the Courts with the result that there was a decree against Ranganatha and his minor son in respect of half the loss occasioned by the breach of trust, payable out of the half share of Periakaruppa's properties in their hands. The result of the two judg-

ments of the High Court in both the suits was against Ranganatha and hence the two present appeals before us by him.

It will now be convenient to take up first the consideration of the succession appeal. The points arising therein have already been set out in the preliminary narration and need no repetition. The main points argued before us on this appeal are :

(1) The conclusion of the High Court that the will of Periakaruppa was ineffective is erroneous and Ranganatha took under the will as *persona designata*.

(2) In case the will is held to be ineffective and in the view taken by the High Court that Alagappa and junior Periakaruppa became divided in status under the *Rajinama* the property of Preiakaruppa devolved on Alagappa to the exclusion of junior Periakaruppa and hence the plaintiff has no right to sue.

(3) The conclusion of the High Court that the *Rajinama* brought about divided status *inter se* between the father Alagappa and the minor son junior Periakaruppa is erroneous and hence the suit is barred by virtue of section 7 of the Limitation Act.

A few other minor points have been raised on both sides which, after consideration, appeared to be unsubstantial and we intimated our view at the hearing and it is not necessary to refer to and deal with them any further. We have heard elaborate arguments on the above three points and have given our careful consideration to them. It is obvious that having rega d to the course of events in this family narrated earlier the primary question for consideration is whether or not the will left by Periakaruppa has brought about an effective disposition of his properties in favour of Ranganatha. It is only if that has become ineffective that the other questions argued before us on this appeal as set out above arise for consideration. In view of the fact that the genuineness of the will is not disputed and no question arises as to the disposing capacity of Periakaruppa,the plaintiff in this case junior Periakaruppa can succeed only if he displaces the will. He has accordingly raised three contentions.

1. That there is no effective dispositive clause in the will.

2. That the disposition, if any, in favour of Ranganatha under the will was an attempt to create an estate in *tail-male* and hence invalid.

3. The disposition in favour of Ranganatha was by reason of and on account of his having been considered by the testator as his duly adopted son, *i.e.*, the validity of the adoption was the basis and the condition for the disposition. Since that has now been found to be invalid, the disposition fails.

Of these three questions the first two though upheld by the trial Court have been rejected by the High Court. We agree with the reasoning of the High Court on these two points and they do not call for any further consideration. We are satisfied that there is no substance in these contentions. The real question that arises on a consideration of the will is whether the disposition of the residue in favour of Ranganatha contained therein was to him as a *persona designata* or is dependent on his being a duly and validly adopted son.

For a proper appreciation of this contention on both sides, it is necessary to set out the relevant clauses in the will.

" (1) I am now 68 years of age, taking into consideration the fact that I have been in indifferent health for sometime past I have decided to make an arrangement after my lifetime in regard to my properties and in regard to the charities established by me and accordingly I have executed this will whole-heartedly.

(2) All the immovable and movable properties entirely, which belong to me as my own and which are in my possession are my self-acquired properties. Excepting myself no other person has any interest or right whatever in the said properties.

(3) ....

(4) Sometime back I took as my foster (son) Alagappan, son of Nachandupatti Chidambaram Chettiar, and brought him up in my house and also got him married. But the aforesaid Alagappan conducted himself in immoral ways and had evil intentions and further fell into bad company and after being duped brought into existence several documents falsely and colourfully by making it appear that he had borrowed debts to the tune of about one lakh of rupees and also caused decrees to be passed in respect of some of the abovementioned debts and estranged my feelings and became inimical towards me, and left my family and was living separately for the past about 10 years and he was also living in his father-in-law's house.

(5) Thereafter while the aforesaid person had instituted a suit O.S. No. 114 of 1926 against me in the Sub-Court of Devakotta for his share in the properties which were in my possession, some of our community people acted as the panchayatdars and gave an award in the above suit and a *rajinama* was filed in the Court, and all the amounts which were payable by me according to the said *rajinama* were already paid by me entirely. Neither the aforesaid Alagappa Chetti nor his heirs shall have any manner of right or interest whatever in the properties which are now in my possession and in the properties which might be acquired hereafter.

(6) Subsequently I took in adoption Nachandupatti Ramanathan Chettiar's son, namely Ranganathan, aged about 17½ years, and he is living with me.

(7) to (12)..

(13) My adopted son Ranganathan and his male heirs shall after the lifetime of my wife Lakshmi Achi properly conduct the aforesaid charities. In order to supervise and see whether Ranganathan conducts the charities properly without any defect whatever, I have appointed the following persons as the executors, namely, (1) my son-in-law Arunachalam Chettiar, son of Alagapuri Alagappa Chettiar who is interested in both myself and Ranganathan, the two sons of Kanadukathan AL. K. Chandra Mouli Chettiar, namely, (2) Karuppan Chetty, (3) Peria Karuppan Chetty, and (4) Murugappan, son of Konapattu Subramanian Chettiar. The said persons shall accordingly supervise (the performance of the charities) in a proper manner.

(14) I am entertaining a desire that I should spend my lifetiem and die at Tiruvarur alone. My body shall not be cremated according to our caste custom, and a *samadhi* (tomb) shall be erected or me, and a lamp shall be lit therein daily and a person shall be appointed to perform *Neivedhiyam* (by preparing food) with 1/4 measure of rice by the big measure daily. *Guru pooja* shall be performed once a year in the *Star* in which I die, by distributing food to the mendicants, and by spending an amount to the extent of Rs. 250 (Rupees two hundred and fifty) every year by inviting my relations. A sum of Rs. 15,000 (rupees fifteen thousand) shall be sent for and obtained from the Saigon firm from out of my own funds for the aforesaid *Tirupani* (service) in the temple and my wife shall conduct the aforesaid *Tirupani*. The daily expenses of the *Samadhi* aforesaid and *Guru pooja*, etc., shall be met from the *Patasala* charity funds and conducted.

(15) Apart from the properties which have been set apart for the abovementioned charities and the properties which have to be newly purchased hereafter for the same, as my adopted son Ranganadhan and his male heirs have to take all the immovable and movable properties belonging to me and as the aforesaid adopted son namely Ranganadhan is now a minor the said Ranganathan shall after he attains majority and if he is of good behaviour (take in his possession) the aforesaid properties after my lifetime and after the lifetime of my wife Lakshmi Achi and enjoy them.

(16) In case the aforesaid Ranganathan does not conduct himself properly or if my wife Lakshmi Achi does not like, the following two persons, namely (1) K. AS. P. Rm. Ramasami Chettiar son of Athangudi Palaniappa Chettiar, and (2) PL. T. Rm. Ramasami Chettiar, son of Karaikud-Thenappa Chettiar shall manage my properties affer the lifetime of my wife Lakshmi Achi till Rangai nathan comes of good behaviour. The amount which may be found just for family expenses shall be paid till such time when the aforesaid Ranganathan, begins to conduct himself properly and when the properties are delivered in his possession.

(17) ....

(18) For the expenses of the maintenance right, etc. of my wife Lakshmi Achi and for the necessary expenses of pilgrimages to sacred places, a sum of Rs. 15,000 (fifteen thousand) dollars has been credited in her name in the Saigon firm, and she shall send for and obtain the amount of interest alone got for the said amount every year and spend it according to her pleasure. My adopted son Ranganathan and his male heirs shall take the principal amount.

(19) ....

(20) As regards the substantial tiled building which belongs to me and which is in my own place and which I am residing, and one bungalow building built by me in the *Therodum veedhi* (street in which the chariot is drawn) in the said place, my wife shall enjoy them after my lifetime and after her my adopted son Ranganathan and his male heirs shall permanently and for ever enjoy the said buildings. Apart from enjoying the abovementioned two buildings, none of them shall have any rigt to alienate them in any manner.

(21) If apart from the matters specified by me herein, it is necessary that any documents should be brought into existence after my lifetime during the lifetime of my wife regarding the properties belonging to me and regarding the charity properties and regarding the family maintenance from time to time I have hereby given authority to my wife Lakshmi Achi mentioned above to execute such documents regarding the same. My adopted son Ranganathan shall perform the funeral obsequies for myself and for my wife.

(22 and 23) ....

(Sd.) *A. L. PR. Periakaruppan Chetty* "

In order to understand the background of this will, it is necessary to recapitulate the previous family history which has already been adverted to at the commencement of this judgment. That is as follows. Periakaruppa adopted Alagappa in or about 1914. He apparently was a spend shrift in his habits and incurred many debts. There developed ill-feeling between them which led to mutual criminal

complaints again each other in 1926. One of his creditors obtained a decree and attached the family house. This led to litigation in which Periakaruppa asserted and succeeded in establishing that the super-structure of the family house, which was a costly one, was his own self-acquisition. During the pendency of this litigation Periakaruppa adopted for the second ime, Ranganatha, claiming to do so by way of custom in the Nattukottai Chetti community. This led to a suit for partition by Alagappa claiming all the properties to be joint properties and for a declaration that the second adoption was invalid. This suit was at a very early stage compromised on the terms that Alagappa and his son were to take away as between themselves a sum of Rs. 1,50,000 in cash and would have no claim of any kind to any of the properties in the possession of Periakaruppa and no claim to interfere in any manner with the various charities and religious endowments which Periakaruppa made. The properties were all admitted to be the self-acquisitions of Perikaruppa and his right to alienate the property by will was specifically recognised. Alagappa with his wife and son, was to clear our of the family house with all their belongings. Alagappa got his share of the cash under the *Rajinama* by means of two hundis one for Rs. 25,000 and another for Rs. 50,000. They were specifically delivered over, as recited in one of the terms of the *Rajinama* to one Chockalingam who was made responsible to discharge all the encumbered debts so far incurred by Alagappa, from out of the moneys of those two hundies so as to make sure that no liability would arise out of the debts previously incurred by Alagappa which might affect Periakaruppa. It is in evidence that after this compromise Alagappa and his family consisting of his wife and son cleared out of the original family house built by Periakaruppa and that they were living separate from Periakaruppa, Periakaruppa and his second adopted son, Ranganatha, were presumably living together in that original family house as stated in the will. This *Rajinama* was on August 15, 1927, and the will was executed on April 4, 1929, *i.e.*, an year and eight months thereafter. It may be noticed at this stage that the *Rajinama* while it admits one of the points in controversy in suit *viz.*, that the property is self-acquired property of Periakaruppan, is silent about the other question at issue *viz.*, as to the validity of the second adoption and in fact the suit was terminated by a formal dismissal thereof presumably leaving this disputed question at large.

The will starts with an assertion that all the moveable and immovable properties in his possession are his self-acquired properties and that excepting himself no other person has any interest or right therein. It asserts that Alagappa conducted himself in immoral ways, fell into bad company, brought into existence several false and colourable documents and borrowed debts to the tune of about a lakh of rupees and caused decrees to be passed in some of them and became inimical towards him. It asserts that Alagappa left his family and was living separately for the past about ten years. Notwithstanding that he was an undisputed adopted son, he referred to him in the will as '*Abhimanaputra*' (foster-son). In contrast with this he states that Ranganatha was *taken* in adoption by him, that Ranganatha was, at the time of the will about 17½ years old and that he was living with him. Clauses 7 to 14 of the will refer to various religious and charitable endowments which he has made and the properties which he gave to them. It also enumerates the arrangements for their management. By clause 8 he makes provision for the construction and maintenance of *Brahmana Veda Patasala* attached to the temple of Sri Sri Theagarajaswami in Thiruvarur. Clauses 8 and 9 set apart certain properties for the due maintenance of the said *Patasala*. Clause 10 relates to the establishment of three charities in addition to the above *Patasala* charity, to be conducted and maintained out of the income of the same properties as have been set apart for the *Patasala* charity. In clause 11 he states that no person shall have any right to alienate or encumber the properties set apart for the charities. By clause 12 he appoints his wife Lakshmi Achi as the manager to conduct the above charities after his lifetime. By clause 13 he directs that his 'adopted son' Ranganatha and his male heirs shall after the lifetime of his wife Lakshmi Achi properly conduct the above-said charities. He appoints three persons as executors to supervise the management by 'Ranganatha'. By clause 14 he expresses a desire to spend the rest of his lifetime at Thiruvarur and die

there. He says that his body shall not be cremated according to custom but that a *samadhi* (tomb) should be erected for him and that a lamp is to be lit there daily and that a person should be appointed to perform *Neivedhiyam* daily, of a specified quantity of rice. By the same clause he also enjoins that *Guru pooja* should be performed once an year in the star in which he dies by distributing food to the mendicants by spending Rs. 250 ever year. He does not specifically indicate who is to perform the *Gurupooja*. The context may well be taken to indicate that the paid employee was to do it. He indicates that a sum of Rs. 15,000 was set apart for the above purposé in a Saigon firm and that it should be sent for and utilised by his wife for the aforesaid *Tirupani*. This, in the context, seems to refer to the construction of the *Śamadhi*. He also says that the daily expenses of the *Samadhi* and the *Gurupooja* expenses should be met from the *Patasala* charity funds. Thereafter come the various provisions relating to the disposition of the residue of his property. The effect of these provisions in clauses 15 and 16 is that after his lifetime his wife Lakshmi Achi should enjoy the residue and that thereafter the "adopted son Ranganatha" is to take them into his possession and enjoy them (after the death of himself and his wife) on his attaining majority and if he is of good behaviour. It is specifically provided that if " the aforesaid Ranganatha" does not conduct himself properly or if his wife Lakshmi Achi does not like (him) two specified persons, K.AS.P.Rm. Ramaswamy Chettiar and PL.T.Rm. Ramasami Chettiar should manage the properties after the lifetime of Lakshmi Achi till ' Ranganatha' comes of good behaviour and that he should be paid by them just enough for his family expenses till such time when 'the aforesaid Ranganatha' begins to conduct himself properly and that the properties are to be delivered into his possession then. Under clause 18 the 'adopted son Ranganatha' should take the principal amount of Rs. 15,000 set apart for his wife Lakshmi Achi after her death. There is also clause 20 which provides that the substantial tiled building belonging to him which is in his own place and in which he was residing and one bungalow built by him in the *Therodum Veedhi* (Car Street) shall be enjoyed by his wife after his own lifetime and that after her lifetime " his adopted son Ranganatha " and his male heirs shall permanently and forever enjoy the said buildings. There are a few other specific legacies in clauses 17 and 18 which require no notice. The scheme of the will is clear *viz.*, that Periakaruppa wanted his own wife to enjoy the properties and to manage the charities so long as she was alive and that the adopted son Ranganatha should do the same after her death, that in respect of the charities he set up a committee of supervision over *his* management (but not in respect of his wife's management) while as respects enjoyment of the properties he specifically provided that the adopted son Ranganatha should enjoy his properties after he attains majority only if he is of good behaviour and that so long as he was not of good behaviour or his wife did not like him, he was to get only some maintenance out of the properties. These provisions are reminiscent of his past experience with the first adopted son Alagappa and are obviously inspired by the experience of bad conduct and wasteful ways which he thought the first adopted son was guilty of. In the will he refers to "adopted son Ranganatha " in quite a number of places and to " aforesaid Ranganatha " or to " Ranganatha " in some places. There is no doubt that in what may be taken to be the dispositive clause, clause 15, he refers to him as " my adopted son Ranganatha " though in the next connected clause, clause 16, he refers to him, as " aforesaid Ranganatha " or as " Ranganatha ". The question for consideration is whether the validity of adoption was the condition for the effectiveness of these dispositions.

The question as to whether a disposition in such terms is to the person intended therein as a *persona designata* or by reason of his filling a particular legal status which turns out to be invalid is one of some difficulty and has been considered by the Courts in quite a large number of cases, some of which have been cited before us. An elaborate consideration of these various cases cannot finally determine the question that arises in individual cases, which must ultimately depend on its own facts and the terms of the particular document containing the disposition. It is enough to refer to two cases of the Privy Council cited before us, *viz.*, *Nidhoomoni Debya* v. *Saroda*

Pershad Mookerjee[1], and *Fanindra Deb Raikat* v. *Rajeswar Das*[2]. As pointed out in the first case the question in all such cases is whether the gift of the property by the testator to a person who is referred to as having been adopted is one which is dependent on whether all the requisites of a valid adoption have been complied with or whether it is to a designated person notwithstanding that it was desired and expected that the requisites for a valid adoption were complied with. As pointed out by their Lordships in the second case " the distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances." In that case their Lordships gave an illustration which is very apt for the present case. It is as follows :

> " If a man makes a bequest to his " wife A.B.", believing the person named to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator."

Now in the present case learned counsel for the respondent very strongly relies on the repeated reference to Ranganatha in the will in the dispositive clauses as the adopted son and says that the disposition was made in his favour by reason of the fact that he was adopted and that he was believed to be duly and validly adopted. He points out that Periakaruppa was apparently a religious man as seen from the various charitable and religious endowments he has made in the will itself He also placed stress on the fact that by virtue of clause 21 of the will, he directs that his adopted son shall perform the *Putra krityangal* (ceremonies to be performed by a son) for himself and his wife (after their respective deaths). It is said that the performance of the various ceremonies after death by a person who was not a son in the eye of *sastras* would be abhorrent to any devout Hindu which Perikaruppa clearly appears to be. This contention is not without force. But taking an overall picture of the provisions in the will and the background of the previous history, it is not possible to say in this case that the validity of the adoption was contemplated by Periakaruppa as the condition on which the validity of disposition should depend. As has been previously pointed out the will has been clearly inspired by his previous experience with his first adopted son Alagappa. When Alagappa did in fact challenge the validity of the second adoption in the suit which he filed and asked for a specific declaration in respect thereof by his plaint, that suit was allowed to be merely dismissed and there was no reference to the validity or otherwise of the second adoption in the *Rajinama*. Apparently it left the question at large. The will having been executed only within about one year and eight months after the *Rajinama* in the suit, the testator Periakaruppa must have been conscious of the fact that the second adoption was open to serious challenge. In this context the reference to Ranganatha as the adopted son in the will as against the reference to Alagappa as a mere *Abhimanaputra* may indicate no more than that the testator is anxious to make it quite clear that he would acknowledge Ranganatha as his adopted son in preference to Alagappa and is indicative of his clear intentions that he desires him to get his properties to the exclusion of Alagappa and his minor son. That he is desirous of excluding by his will Alagappa and his son is apparent from his very categorical statement in clause 5 of the will that neither the aforesaid Alagappa nor his heirs shall have any manner of right or interest whatever in the properties which were then in his possession and any properties which may be acquired thereafter. The will itself is, therefore, obviously intended to exclude them from succeeding to his property. Being aware of the likelihood of the challenge as to the validity of adoption of Ranganatha he could not have intended the disposition to fail in the contingency of the second adoption being held invalid thereby letting in the very persons whom he wanted to exclude. The provisions in the will which give the property to Ranganatha, only if he is of good behaviour seem rather to indicate that he attached greater importance to the character of the boy rather than to his legal status as an adopted son. It is true that he contemplated, ceremonies to himself and his wife after their death being performed

1. (1876) L.R. 3 I.A. 253. 2. (1884) L.R. 12 I.A. 72, 89.

by the adopted son Ranganatha. But it is noteworthy that he chose the course of having his body enshrined in a tomb after his death and making arrangements for worship being conducted every day and *Guru pooja* on the day of his own annual *sradh* day. This may well have been felt by him to be a substitute for the regular annual *sradh* by an undisputedly valid adopted son whom he did not like. It is also noteworthy that there is no indication that he contemplated the *Gurupooja* as having to be done by Ranganatha, after the death of his wife. How exactly the testator viewed the second adoption of Ranganatha and the alleged custom enabling him thereunto may well be gathered from para. 8 of his written statement in O.S. No. 114 of 1926 which is as follows :

"The allegations in paragraph 11 of the plaint are false. This defendant has really taken in adoption the 2nd defendant. The aforesaid adoption is valid in accordance with the custom of Nattukottai Chettiar's. There are may differences in the matter of adoption between Nattukottai Chettiar's and other caste people as stated below. Their custom alone can prevail in the matter of the adoption taken by them and neither the law nor the Sastras can bind them. As adoption is made among Nattukottai Chettiar's only with the intention that the adopted son should render them help and assistance (1) those who make adoption pay money to the parents Vagaira as price for the adopted boy. (2) Neither Dattaka Chandrika or Dattaka Mimamsa can bind them. (3) If one person has two wives, the two wives adopt two sons. (4) If the son of a person dies leaving his widow, the father takes a boy in adoption for himself, and the widowed daughter-in-law takes another boy in adoption. (5) If a grandson by son is born to one person and the son dies, the aforesaid person takes a boy in adoption even when the aforesaid grandson is living. The customs with regard to adoption among Nattukottai Chettiars are in existence as stated above. (6) As the aforesaid Chettiars are traders, a person can take in adoption another boy, if the adopted son acts against the will of the adoptive fathe without improving the property."

This seems to indicate that in his view such a customary adoption was made for temporal rather than for spiritual reasons. Taking an overall picture of the various provisions in the will, it appears to be reasonably clear that Ranganatha notwithstanding his description as adopted son in the will in several places, was intended by the testator to take the property as *persona designata* and that the will was therefore effective to convey title to him to residue of properties left by Periakaruppa after his death.

No question has been raised that the condition in the will that Ranganatha is to take the property only if he is of good conduct and behaviour, has operated to prevent the title vesting in him and it may be doubtful whether if a clear intention of the testator can be gathered from the will to bequeath the residue to Ranganatha as *persona designata* the condition of good conduct and behaviour would be valid to prevent the vesting of the title.

We have, therefore, come to a clear conclusion that Ranganatha obtained title to the properties of Periakaruppa under the will. This is in accord with the conduct of Alagappa for over 14 years after the death of Periakaruppa and his wife, in keeping silent and allowing Ranganatha to enjoy the properties without laying any claim to the property on the ground of the invalidity of the will and the invalidity of the adoption, thereby indicating how he understood the will. In this view the other questions raised in this appeal do not call for consideration.

This appeal, *i.e.*, Civil Appeal No. 169 of 1956, is accordingly allowed with costs throughout and the plaintiff's suit dismissed.

The questions that arise for decision in the trust appeal may now be taken up for consideration. The plaintiff in the trust suit also is junior Periakaruppa. There were five defendants in the suit. First and second defendants are Ranganatha and his minor son. The third defenant is the son of Chockalingam. The fourth and fifth defendants are the father, Alagappa and Muthayi Achi, mother of junior Periakaruppa. The plaintiff's case as set out in the plaint is that by the terms of the compromise in O.S. No. 114 of 1926 on the file of the Subordinate Judge of Devakottai

"Periakaruppa and Chockalingam were constituted joint trustees for himself who was then a minor and that they were enjoined the duty of having the amount invested from time to time in Chetty firms, that the above terms were accepted by all the parties concerned including Periakaruppa and that consequently both Periakaruppa and Chockalingam accepted the position of joint trustees for the plaintiff for duly safeguarding and improving his moneys."

He alleges that the

> "said trustees were, therefore, bound to see to the proper investment of the said moneys in reliable and sound Chetti firms and for their accumulation with accrued interest during the plaintiff's minority and to pay the accumulation to the plaintiff on his demand on his attaining majority."

He says further in the plaint that he learned after attaining majority that the entire amount was appropriated by Chockalingam for discharging his own personal debts and that he made it appear as if he had credited the trust amount in his own firm, that eventually when his firm became involved (financially) he (Chockalingam) appears to have executed of his own accord a simple mortgage dated May 3, 1930 (*i.e.*, during the minority of junior Periakaruppa) of his house at Athangudi (in South India) together with a small item of property in Burma in favour of the plaintiff and another creditor for a sum of Rs. 1,00,000 of which Rs. 70,000 was intended to be the plaintiff's money and the other Rs. 30,000 of the other creditor. The plaintiff further says in his plaint that the house which was the main item of security in the mortgage had no marketable value, that the mortgage was a one-sided affair and that he repudiates the same. He claims accordingly that both the trustees Periakaruppa and Chockalingam were bound to render to him an account of the trust amount and if they had not properly invested it they were bound to repay it to the plaintiff with interest. He alleges that the trustees were bound to invest the amount in securities authorised by law and that they were bound to invest the moneys in sound third party Chetti firms. He also alleges that Periakaruppa knew at the time the involved circumstances of his co-trustee and either colluded with him or failed in his duty to protect the plaintiff's interests. He accordingly claims that Periakaruppa jointly with Chockalingam were liable for the gross breach of trust in respect of the said amount. He further alleged that on the death of Periakaruppa on July 14, 1929, and of Chockalingam in September, October, 1934, he the plaintiff was entitled to recover the amount due to him from the estate of Periakaruppa in the hands of defendant No. 1 and of Chockalingam in the hands of defendant No. 3.

The first defendant filed, along with his minor son the second defendant, an elaborate written-statement the substance of which was that Periakaruppa was not constituted a trustee nor did he accept or assume the position of or acted as a trustee for the plaintiff in respect of the sums mentioned in the plaint. He states that, on the other hand, the only persons who were competent to act on behalf of the plaintiff were his guardians or his parents and the Rajinama conferred no right on Periakaruppa to override any acts done by plaintiff's legal guardians on behalf of the plaintiff's moneys. It is further stated that there was nothing improper on the part of Chockalingam along with the plaintiff's father and mother in realising the same under the hundi (for Rs. 75,000 due to junior Periakaruppa) and handing it over to Rangoon A.P.S. Firm (Chockalingam's firm) for being invested. He further states that the said firm was in a flourishing and solvent condition then and during all the time Periakaruppa was alive, and that there was absolutely no negligence or improper motive on the part of anybody in entrusting to the said firm for investment or in investing in the said firm, the money realised for the said hundi drawn by Periakaruppa. It was further stated that the first defendant therein understood that out of the said moneys with Chockalingam's firm a sum of Rs. 30,000 was withdrawn by the parents and guardians of the plaintiff and invested the same *bona fide* in the purchase of a house for the benefit of the plaintiff on July 23, 1928, which was proved to be in the possession of the plaintiff and continued to be so and that the plaintiff must be taken to have ratified the said purchase. The written-statement also states that in or about the year 1930 after the death of Periakaruppa there were some disturbances in Burma and that the parents and guardians of the plaintiff, with a view to safeguard the interests of the plaintiff completely and effectively, wanted from the said Chockalingam security of landed property and thus obtained the mortgage referred to in the plaint of his residential house and bungalow at Athangudi and of the business permises of Chockalingam at Bogale in Burma. The written-statement proceeds to say that the plaintiff is bound by the acts of his parents and guardians in entering into,

such an arrangement made in his interest and for his benefit. It is also further stated that on February 17, 1936, the house, and bungalow of Chockalingam at Athangudi which was the subject-matter of the mortgage above mentioned, were purchased in Court auction by Alagappa the father of junior Periakaruppa for a small sum of Rs. 1,000 subject to the mortgage and that this course was adopted as a means of realising the amount due to the plaintiff on the mortgage deed without the necessity to incur any costs of a suit. It is thus claimed that the mortgage as well as the subsequent purchase of equity of redemption were all transactions by Alagappa for the benefit of his minor son and acting for him and that the plaintiff is not entitled to repudiate these transactions. The third defendant, son of Chockalingam, also filed a written statement denying that there was any trusteeship or acceptance thereof by his father, that the relations between the minor represented by his mother and father on one side, and Chockalingam on the other side, with whom the moneys were kept was solely one of creditor and debtor and that the minor's money was properly invested with Chockalingam and that by then he was in a flourishing condition, that the hypothecation of May 3, 1930, was more than sufficient to cover the debt due and that the properties covered by the mortgage were brought to sale in Court auction subject to the mortgage and were purchased by the plaintiff's father acting in his interest, that one of the properties so purchased has been resold and the sale proceeds realised by the plaintiff, that the other property is still in possession and enjoyment of the plaintiff and that therefore there was no loan outstanding. He further says that the remedy, if any, of the plaintiff was against his father and mother and not against himself.

The suit was decreed in the trial Court by ordering defendants 1 to 3 to pay a sum of Rs. 1,39,672-13-6 with interest from out of the assets of Periakaruppa and Chockalingam in their hands. Now, it does not appear that the third defendant appealed against this decree either to the High Court or to this Court. His liability under that decree is not, therefore, in any way affected by the subsequent proceedings on appeal to the High Court and this Court and it is unnecessary to refer to him or his liability in what follows.

The contention of the plaintiff's counsel that Periakaruppa and Chockalingam constituted joint trustees for the sum of Rs. 75,000 payable to him under the compromise dated August 15, 1927, is one that is founded on the terms of the compromise. It is necessary therefore to set out the relevant terms thereof.

"1. As settled by the four Panchayatdars *viz*. (1) N. AR. Arunachalam Chettiar of A. Muthupattanam, (2) SP. AR. S. Chidambaram Chettiar of Athangudi, (3) M.T. A.M. Muthiah Chettiar of Kottaiyur, and (4) RM. AL. Alagappa Chettiar of A. Muthupattanam directing the first defendant to pay to the plaintiffs separately in respect of the right claimed by the plaintiffs in the suit filed by the plaintiffs herein for partition on the ground that they are also entitled to a share in the properties mentioned in the plaint in this suit, the first defendant has executed 3 hundis mentioned hereunder and issued on the 29th Ani, Prabhava (13th July, 1927) in the names of the plaintiffs for Rs. 1,50,000 *i.e.*, Rs. 75,000 to the first plaintiff and Rs. 75,000 to the second plaintiff with instructions to separately pay to the aforesaid plaintiffs and accordingly the plaintiffs have, at any time hereafter, no right and future connection whatever either in the properties mentioned in the plaint in this suit, or in any other property in the possession of the first defendant, or in any property that the first defendant shall hereafter acquire. The first defendant alone, shall as he pleases, enjoy as usual the aforesaid entire properties, as his self-acquired properties with all Swatantram and right and powers of alienation such as gift, exchange, sale, etc. The first defendant has the right also to alienate the aforesaid entire properties either by a will or otherwise.

2. The first defendant shall for the hundis Nos. 1 and 2 out of the 3 hundis for Rs. 1,50,000 mentioned in paragraph 1 herein, pay the principal of Rs. 75,000 and interest within Purattasi of this Prabhava year (16th October, 1927). The principal of Rs. 75,000 under the remaining hundi No. 3 shall be paid within the 30th Panguni of the year Prabhava (11th April, 1928).

3. The Sridhanam amount of Rs. 14,000 of Muthayi Achi, mother of the second plaintiff, and the second plaintiff's amount of Rs. 75,000 out of the aforesaid amount of Rs. 1,50,000 under the hundis, shall be invested in Chetti houses in the name of the second plantiff to the order of Periayakaruppan Chettiar, the first defendant, and to the order of A.P.S. Chockalingam Chettiar of Athangudi, the junior paternal uncle of the aforesaid Muthayi Achi, and the aforesaid two persons shall be in management. The signature letters and accounts pertaining to the aforesaid amounts shall be with the aforesaid Chockalingam Chettiar.

4 to 9...

10. As A.P.S. Chockalingam Chettiar is liable for the discharge of the encumbrances that have been created by the first plaintiff as mentioned in paragraph 4 herein, the first plaintiff Alagappa

Chettiar has endorsed on the undermentioned first and second hundis that they are payable to the order of the aforesaid Chockalingam Chettiar and they have been deivered to the aforesaid Chockalingam Chettiar.

It is therefore prayed that the Court may be pleased to record the razinamah in the suit and to dismiss this suit.

Details of the hundis.

1. The hundi for Rs. 50,000 issued on the 29th Ani of the year Prabhava (13th July, 1927) directing Rangoon Thamappan PL. T. RM. Karuppan Chettiar to pay money with Rangoon nadappu interest.

2. The hundi for Rs. 25,000 issued on the 29th Ani of the year Prabhava (13th July, 1927) directing Rangoon M. A. M. S. Meiyappa Chettiar to pay money with Rangoon nadappu interest.

3. Hundi for Rs. 75,000 issued on the 29th Ani of the year Prabhava (13th July, 1927) directing Rangoon RM. P. A. Muthiah Chettiar to pay money with Rangoon nadappu interest."

The whole argument for the plaintiff is based on the provision contained in para. 3 that the *Sridhanam* amount of Rs. 14,000 of Muthayi Achi, mother of the second plaintiff (which, it is said, has been given up by the plaintiff's mother in his favour) shall be invested in Chetti houses in the name of the second plaintiff to the order of Periakaruppa Chettiar and to the order of A.P.S. Chockalingam Chettiar of Athangudi. This provision—it is contended—shows that the money under the hundi meant for the minor was to be invested, by Periakaruppa and Chockalingam in Chetti houses in the name of the plaintiff but to their order. It is said that the amount so invested was, therefore, payable to themselves or to their order and that they were charged with the duty of seeing that the money was properly invested by operating on the minor's deposit in their joint names and changing the investments when found necessary. It is urged that, therefore, both of them were constituted thereby as the legal owners of the amount, the beneficial ownership remaining with the minor and that to this legal ownership was attached the obligation of seeing to the proper investment of the money and the augmentation of fund by the addition of substantial interest obtainable from reliable Chetti firms. In order to determine whether this contention is correct, it is necessary to notice the terms of the relevant hundi of the same date as the *Rajinama*. This and other hundis issued by reason of the *Rajinama* must be taken to be part of the *Rajinama* inasmuch as they were referred to therein by description under the heading "Details of the hundis". Learned counsel for the respondent, junior Periakaruppa urges that for this purpose it is the *Rajinama* alone that has to be looked into but not the terms of the hundi. We are unable to agree with this contention. We have no doubt that the *Rajinama* and the hundis are integrally one and must be read together. The hundi dated August 15, 1927, for Rs. 75,000 issued by Periakaruppa for the benefit of junior Periakaruppa as part of the *Rajinama* is as follows :—

"Credit to minor Periakaruppa Chetti, son of AL. PR. Alagappa Chetti of A. Muthupattanam—Debit to AL. PR. Periakaruppan Chettiar.

Out of the sum of Rs. 1,50,000 payable by me according to the razinamah entered into in O.S. No. 114 of 1926, on the file of the Sub-Court, Devakotta, on the 29th Ani of this year (13th July, 1927) . . . . the amount towards your share for improving the same by making investments in Chetti firms for interest in your name and to my order and to the order of Athangudi A. P. S. Chockalingam Chettiar, is Rs. 75,000. Rangoon RM. P. A. Muthia Chetti shall, on demand, pay money for this sum of Rs. 75,000 together with Rangoon nadappu interest from the 29th Ani of this year (13th July, 1927) to the order of the three, *viz.*, (1) AL. PR. Alagappa Chetti, (2) Muthayi Achi, mother and guardian of minor Periakaruppan Chetti, son of the aforesaid person, and (3) A. P. S. Chockalingam Chettiar of Athangudi, and debit it in my account with endorsement of payment made herein.

(Sd.) *AL. PR. Periakaruppan Chettiar.*"

Now taking para. 3 of the *Rajinama* and this hundi together, it is clear that the banker of Periakaruppa one RM. P.A. Muthiah Chetti of Rangoon was to pay this amount to the *order* of the three persons, Alagappa, Muthyi Achi, and Chockalingam and that the said amount was to be invested in the name of the minor in Chetti firms to the *order* of Periakaruppa and Chockalingam. Now it is the contention of the learned counsel for junior Periakaruppa that the word 'order' used in both these places has the same meaning as in the Negotiable Instruments Act, 1881 (XXVI of 1881) and that therefore what is contemplated is that the money under the hundi was in the first instance payable by Muthiah Chetti on whom

it is drawn on the joint signatures of all the three persons named in the hundi, *i.e.*, Alagappa, Muthayi Achi and Chockalingam and that what is further contemplated is the investment of that money by Periakaruppa and Chockalingam in Chetti firms in the name of junior Periakaruppa to the joint order of both of them. On this view, it is said that both these persons have the power to draw the money so invested whenever they choose and have the control of the money and in that sense have the legal ownership of the money vested in themselves notwithstanding that the amount is invested in the name of the minor to indicate his beneficiary ownership. Learned counsel for the appellant Ranganatha contends that this is not the proper interpretation of the word 'order' as used in reference to the joint names of Periakaruppa and Chockalingam. He refers us to certain cases of the Madras High Court which recognised the practice of Chetti firms receiving deposits in the name of a particular person to the *maral* of certain other person or persons and that the idea of *maral* is merely to indicate that the change of investment was to be made with the consent of the *maraldar* without in any way affecting the ownership of the person in whose name the money is deposited. According to the cases on which he relies, the *maraldar* has no right to operate on the account and withdraw the money. It has been pointed out to us on the other side that the material word used in this context both in para. 3 of the *Rajinama* and in the hundi itself is 'order' and not '*maral*'. It is also urged that the word *maral* has acquired no such settled meaning, as the appellant ascribes to it. There are decisions showing that the questions as to what the word *maral* means is one that must depend on the proof in each particular case of usage of that word by the Nattukottai Chetti firms. This has been laid down by the Privy Council in *Arunachalam* v. *Vairavan*[1], and in *Muthuraman* v. *Periannan*[2]. In view of these decisions and the fact to which our attention has been drawn that there is no pleading in this case as to the meaning of the word '*maral*' or that the word '*order*' in the context of this case has been used in the sense of *maral*, we are not prepared to uphold the contention that the word 'order' in this case can be given the meaning which is attributed to the word '*maral*' in some of the cases which have been cited to us for the appellant. It does not, however, follow that the word 'order' in this case in its application to the two persons Periakaruppa and Chockalingam, is used in the sense which it has under the Negotiable Instruments Act. Learned counsel for the respondent, junior Periakaruppa, relies on section 13(1), Explanation (iii), taken with sections 8, 9 and 78 of the Negotiable Instruments Act. He urges that in the case of a negotiable instrument the person who is indicated as the 'orderdar' (if that word may be used in this context) is the holder thereof and is the person who is entitled to receive the amount thereunder and to give a discharge in respect thereof and that, therefore, he is virtually the legal owner thereof. If, as held in *Krishnashet bin Ganshet Shetye* v. *Hari Valijibhatye*[3], the Negotiable Instruments Act, (in the absence of any local usage to the contrary) applies to hundis, what is urged above may well be applicable to the money of the original hundi for Rs. 75,000 drawn on Muthiah Chetti and specifically payable on demand to the order of the three persons, Alagappa, Muthayi Achi and Chockalingam. But the position as regards the amount so collected, and thereafter invested in the name of junior Periakaruppa is not necessarily the same. It is true that para. 3 of the *Rajinama* and the narration in the relevant hundi clearly show that the amount of the hundi (apparently after realisation thereof) is to be invested in Chetti firms in the name of minor Periakaruppa and that such investment is to be to the order of both Periakaruppa and Chockalingam. This is obviously nothing more than a deposit in the name of the minor after such collection. The investment would presumably be covered by an ordinary deposit receipt in the name of the minor. A deposit receipt of that kind does not fall within the definition of 'negotiable instrument' under section 13 of the Negotiable Instruments Act. There is no authority for showing that such a deposit receipt is a document to which the notions of Nego-

1. (1929) 57 M.L.J. 628 : A.I.R. 1929 P.C. 254 at 256 (P.C.).
2. (1934) 67 M.L.J. 317 : A.I.R. 1934 Mad. 621, 622.
3. (1895) I.L.R. 20 Bom. 488.

tiable Instruments Act as to the use of the word 'order' and the legal implications thereof would be applicable. On the other hand there appears to be authority to the contrary. See, *Sethna* v. *Hemmingway*[1], and In re *Travancore National Bank Ltd.*[2]. Both these cases indicate that a deposit receipt is not a negotiable instrument. It is true that in the language of the hundi, at both places, *i.e.*, (1) where the hundi is to be cashed, and (2) at the place where the cash so collected is to be invested, the same word 'order' is used with reference to different sets of persons. It is, therefore, suggested that they have to be understood in the same sense. But the hundi, though intended for the minor and credited to him, is not drawn specifically in favour of the minor but only to the order of certain named individuals, while the investment is to be made specifically in the name of the minor indicating that he is the owner thereof. It would be begging the question to say that the orderdars in this context are the legal owners and that hence this indicates only his beneficial ownership. It appears to us reasonably clear that merely because para. 3 of the *Rajinama* and the narration in the relevant hundi contemplate the amount of hundi on realisation to be invested in Chetti firms in the name of the minor to the order of both Periakaruppa and Chockalinga, it does not *ipso facto* follow as a matter of law that both of them are authorised to operate on it in the sense that they can withdraw the money and have the control of it in the same way as a person to whose order a bill of exchange or a cheque is payable, can have. While it is true that the appellant Ranganatha has not made out that the word 'order' is used in the sense of the word '*maral*' and has not pleaded or proved what *maral* or order in this case means, the plaintiff has not equally made out that the word 'order' in para. 3 of the *Rajinama* in its application to Periakaruppa and Chockalingam in the context, authorises them to obtain absolute control of the money deposited. But it is urged that this is implicit in the language of para. 3 which refers to investment and management. Undoubtedly under the terms of the *Rajinama* the amount is to be invested in Chetti firms in the name of the second plaintiff and the two persons, Periakaruppa and Chockalingam, are to be associated with the investment, by its being designated as being to their order, whatever that may mean, and they are also enjoined and associated with it in the following terms.

"*Iruvarghalum mel parthu varavendiyadu.*"

This clause which is in Tamil language has been translated in the official translations as "the aforesaid two persons shall be in *management*". Two out of us in this Bench who have a fairly working acquaintance with Tamil language are not satisfied that 'management' is a correct translation for the word '*mel parthu*'. What the clause contemplates is '*mel parve*' which literally means 'over seeing'. It conveys the idea of 'supervision' and does not imply the capacity to operate on the deposit. But it is suggested that the relevant clause taken as a whole indicates that both together have the power of investment and reinvestment as indicated by the use of the phrase in Tamil, *viz.*, '*koduthu vangi*' which means 'giving and taking', *i.e.*, 'lending and taking back'. This phrase is generally used to indicate 'investing'. But it is not very clear in the structure of the sentence in which this phrase occurs that it is the two persons Periakaruppa and Chockalingam that are to do this 'investing'. The word '*iruvarkalum*' in this sentence follows '*koduthu vangi*' and precedes '*mel parthu varavendi yathu*' and indicates rather that their joint responsibility relates to only '*mel parval*' and not '*koduthu vangal*'. In a matter like this, however, relating not merely to the meaning of a particular word such as '*mel parthu*' as above but to the contextual meaning of an entire clause in which a particular phrase like '*koduthu vangi*' is used, we do not wish to base the decision on our own impression as to the implication of that phrase in the context and would prefer to go by the official English translation which is as follows :—

> "The amount . . . . . . shall be invested in Chetti houses in the name of the second plaintiff, to the order of Periakaruppan Chettiar, the first defendant, and to the order of A. P. S. Chockalingam Chettiar of Athangudi, the junior paternal uncle of the aforesaid Muthayi Achi, and the aforesaid two persons shall be in management."

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1. A.I.R. 1914 Bom. 286, 287. 2. A.I.R. 1940 Mad. 157, 159.

But even this does not indicate that the power of investment is vested in them but only '*mel parvo*' which, in our view, has been wrongly translated as 'management'. Taking the whole of this clause carefully we are not satisfied that the language clearly indicate that the power of operating in respect of the deposit by way of withdrawing the amount and being in control thereof is vested in Periakaruppa and Chockalingam. All that the language indicates with certainty is that these two persons are specially enjoined to supervise the investments and that they are "orderdars" whose meaning has not been made out. In such an ambiguous situation as to the meaning of the words used and the intention of the parties thereto, it is permissible to look into and consider what the contemporaneous actings of the parties are which may be treated as virtually part of the same transaction.

The hundi for Rs. 75,000 for the benefit of junior Periakaruppa, dated August 15, 1927, was, according to para. 2 of the *Rajinama* payable by April 11, 1928. There is an endorsement on the hundi signed by Alagappa, Muthayi Achi and Chockalingam, dated May 31, 1928, to the effect that the money due under that hundi is to be paid to Rangoon A.P.S. Firm (which means Chockalingam's firm) together with interest thereon. On the terms of the hundi the interest was payable from July 13, 1927, on which date the *Panchayatdars* appear to have settled the terms of the *Rajinama*. This shows that the amount was actually drawn on the signatures of the three persons and was intended to be collected by Chockalingam's firm at Rangoon. The hundi also bears a note signed by Chockalingam's agent A.P.S. Somasundaram that the principal and interest of the hundi amounting to Rs. 80,726-15-3 was received through another banker named KM. CN. Somasundaram Chetti as per letter of Periakaruppa to KM. CN. Somasundaram Chetti on April 10, 1928. It is in the evidence of this A.P.S. Somasundaram, clerk of Chockalingam, who was examined as P.W. 2 on commission, that after its withdrawal the money was in fact credited on or about June 19, 1928, in the accounts of A.P.S. Firm at Rangoon in the name of junior Periakaruppa, to the order of (senior) Periakaruppa and Chockalingam *under the directions of Chockalingam*. It is the evidence of this Somasundaram that Chockalingam directed him to invest the amount in Rs. 4,000 or Rs. 5,000 in reliable and sound Chetti firms, presumably meaning thereby that the idea was to keep the money in the A.P.S. Firm provisionally until he was able to invest the money safely by distributing it over several reliable Chetti firms in comparatively small sums. That this was the real intention of everybody concerned in entrusting the money to the A.P.S. Firm is confirmed by what is narrated in Exhibit P-4 a receipt issued in favour of Periakaruppa, for the total sum of Rs. 75,000 collected in respect of the two hundis for the amounts of Rs. 50,000 and Rs. 25,000 respectively, belonging to Alagappa under the compromise. That receipt shows the collection of a sum of Rs. 76,274-1-9 being the principal and interest of the two hundis and recites also some other matters. It ends with the following significant narration :

> "We shall obtain money for the hundi for Rs. 75,000 of minor Periakaruppan Chettiar and for the hundi for Rs. 14,000 credit it in the firm of Rangoon A. P. S. invest in our Nattukottai Chetti firms for *thavanai* to the order of (1) AL. PR. Periakaruppan Chetti of A. Muthupattanam, and (2) A. P. S. Chockalingam Chetti of Athangudi, and deliver the copy of the aforesaid debit and credit account, and copies of the signature letters."

This is signed by A.P.S. Chockalingam Chettiar as the power agent of AL. PR. AL. Alagappa Chettiar and also by Muthayi Achi for herself and for minor Periakaruppan Chetti. This narration in the receipt indicates quite clearly that it was the father and the mother of the junior Periakaruppa that took the responsibility of authorising the A.P.S. Firm to collect the hundi amount and of investing it in other Nattukottai Chetti firms for *thavanai*. The intention clearly appears to be that it is Chockalingam that was to collect the money on the hundi and it was Chockalingam that was to arrange for the investment of the same (on the legal responsibility of Alagappa and Muthayi Achi, the natural guardians of the minor). This is exactly what is borne out as to what happened thereafter as appears from the evidence of Chockalingam's clerk, Somasundaram, P.W. 2. This seems really to indicate that what the parties throughout intended was that while the collection of the money under the hundi was to be under the signature of all the three, *viz.*,

Alagappa, Muthayi Achi and Chockalingam, the agency actually to collect was to be the firm of Chockalingam in Rangoon and it is that firm that was to arrange for distributing the money over various other Nattukottai Chetti firms by way of safe and good investments on the implied authority of the natural guardians, *viz.*, the father and mother. This obviously would take some time and during this time Chockalingam's firm would naturally have to be in charge of the funds. It appears reasonably clear, however, that a long term investment in Chockalingam's firm as such was *not* contemplated. This may be inferred from the wording in para. 3 of the *Rajinama* which says that "the signature letters and accounts pertaining to the aforesaid amount shall be with the aforesaid Chockalingam Chettiar." In the context this obviously means that the deposit receipt and the periodical accounts relating to that deposit by way of addition of interest and so forth were to be in the custody of Chockalingam. Thus Chockalingam was the person primarily intended to collect the money and to be in charge of the investment, that pending final investment Chockalingam was to have temporary custody of the amount. The point to be noted about this subsequent conduct of the persons concerned is that in respect of these various matters Periakaruppa does not at all come into the picture. The narration in the receipt, Exhibit P-4, which recites under the two signatures thereto, of Chockalingam as agent of Alagappa and Muthayi Achi as guardian, is that they undertake to obtain the money and invest it in Nattukottai Chetti firms for *thavanai*. It does not indicate that it will be so invested on the instructions or consent also of Periakaruppa. Nor does Somasundaram, P.W. 2, in his evidence give any indication that the collection by and investment in, Chockalingam's firm was actually done under the instructions of Periakaruppa or that it was thereafter contemplated that in splitting the amount into smaller sums, it would have to be under instructions of Periakaruppa also. There is no evidence that Chockalingam sent his instructions to his clerk Somasundaram with the knowledge and consent of Periakaruppa or in collaboration with him. It is also significant that the only further act of reinvestment which was made during Periakaruppa's life time, *viz.*, the purchase of a house for Rs. 30,000 at Athangudi in the name of junior Periakaruppa and of which the minor is admittedly enjoying the benefit, does not appear to have been with the knowledge or consent of Periakaruppa. Thus looking at the actings of the parties concerned, there is nothing to show that the parties understood the term in para. 3 of the *Rajinama* as laying on Periakaruppa the responsibility of actually making investments and reinvestments and for that purpose to operate and withdraw the amounts from the banker or bankers with whom the hundi money after collection was to be invested.

Learned Judges of the High Court were greately influenced by the assumption that it could not have been the intention of Periakaruppa to allow a spendthrift like Alagappa to handle the funds of the minor for purposes of investment or change of investment and that therefore it must have been intended that both the persons Periakaruppa and Chockalingam were to have that power and that this was what was meant by directing that the minor's money must be invested "to the order of Periakaruppa and Chockalingam". It is true that the handling of the minor's funds by his father Alagappa alone was not likely to have been contemplated. But that does not necessarily mean that Periakaruppa took upon himself the responsibility for such handling either by himself or jointly with Chockalingam. On the other hand it looks as though that it was Chockalingam that took such responsibility. Though not himself a *panchayatdar* he must have helped to bring about the compromise on the side of Alagappa, Muthayi Achi and junior Periakaruppa. This is indicated by his having signed the *Rajinama* as a witness thereto. The entire set-up of the Rajinama and the subsequent actings show that all the parties concerned including Periakaruppa himself had confidence in Chockalingam who was no other than the paternal uncle of Muthayi Achi, the mother of the minor. In fact even as regards the sum of Rs. 75,000 payable to Alagappa himself under the two hundis it was Chockalingam alone that was constituted virtually the trustee for collecting the said hundi amounts and paying thereout the debts which had

by then been incurred by Alagappa. This is clear from that fact appearing in paras. 4 and 10 of the *Rajinama*. Para. 10 says that the plaintiff Alagappa has endorsed on the two hundis belonging to him that they are payable to the order of Chockalingam and it further recites that the hundis have been delivered to the aforesaid Chockalingam. It is specifically stated in that para. that Chockalingam was liable for the discharge of encumbrances that have been created by the first plaintiff therein (Alagappa). This was reiteration of what was stated in para. 4 which says that whatever be the encumbrances created by the first plaintiff in respect of any property mentioned in the plaint in the suit, the aforesaid Chockalingam shall discharge them without any liability whatever to the first defendant. It is clear that Periakaruppa was willing to trust Chockalingam completely even in respect of a matter which would directly affect him, *viz.*, the discharge of Alagappa's debts incurred by way of encumbrances, so as to relieve him from all liabilities for such debts. It is unreasonable, therefore, to assume that he was not prepared to leave the responsibility for the collection and investment of the minor's funds also with Chockalingam but that he undertook a joint responsibility with him in respect of the same. Undbubtedly para. 3 of the *Rajinama* indicates that the amount was to be deposited to the order of Periakaruppa as also Chockalingam and that both together are to have '*mel parvi*' (supervision). But whatever may be the connotation of this provision, it does not appear to us, with great respect to the learned Judges of the High Court, reasonable to attribute to Periakaruppa the undertaking of the responsibility of a trustee on its basis. Trusteeship is a position which is to be imputed to a person on clear and conclusive evidence of transfer of ownership and of the liability attached to such ownership on account of confidence reposed, and on such liability having been accepted by the alleged trustee. There is no clear and conclusive proof of any of these elements in the present case so far as Periakaruppa is concerned.

Learned counsel for the respondent has also relied upon a statement in the affidavit of Muthayi Achi, mother of junior Periakaruppa, dated August 6, 1927, in respect of the application for compromising the litigation on behalf of the minor in which it is stated as follows :

> "The first defendant (meaning Periakaruppa) has given *a hundi* for Rs. 75,000 to my junior paternal uncle A. P. S. Chockalingam Chettiar on behalf of the minor second plaintiff in accordance with the award of the Panchayatdars. It has been settled that the aforesaid amount of Rs. 75,000 should be deposited in Chetti firms in the name of the aforesaid minor, to the order of the first defendant and the aforesaid A. P. S. Chockalingam Chettiar and improved."

It is urged that when the hundi itself has been handed over to Chockalingam, as this affidavit indicates, the very property belonging to the minor must be taken to have been delivered over to Chockalingam as one of the two persons in whose order the money was to be deposited and that this, in law, amounts to transfer of ownership to one, on behalf of both, with the obligation attached and that the acceptance thereof must be assumed in view of the fact that the whole of the *Rajinama* including this term was agreed to by Periakaruppa along with the others. It is quite clear, however, in this case that the mere delivery of the hundi to Chockalingam cannot be treated as itself transfer of ownership of the money which was to be collected in respect thereof. Paras. 1 and 2 of the *Rajinama* itself are in substance as follows :

> "That the Panchayatdars *directed the first defendant* (Periakaruppa) *to pay to the plaintiffs* a total of Rs. 1,50,000, and that the first defendant accordingly executed three hundis in the names of the plaintiffs".

Thus by virtue of the direction to pay, the compromise brought about between Periakaruppa on one side and Alagappa and junior Periakaruppa on the other, the relationship of debtor and creditor. It is obvious that until the hundis are realised that relation would continue. There is no transfer of ownership till then. (*See* In re *Beaumont, Beaumont* v. *Ewbank*[1]. Further, as has already been noticed, the hundi issued by Periakaruppa in respect of junior Periakaruppa's share of Rs. 75,000 was originally issued upon Muthiah Chettiar of Burma but was ultimately realised

1. (1902) 1 Ch. 889.

through one KM. CN. Somasundaram Chetti on a letter written by Periakaruppa to him. This indicates that for some reason or other the hundi could not be cashed on the original banker and had to be realised through another banker. In this state of facts it is not feasible to say that the mere handing over to Chockalingam of the original hundi drawn on Muthiah Chettiar on the date of the compromise itself (as mentioned in the affidavit of Muthayi Achi) can be treated as transfer to Chockalingam of the very property of junior Periakaruppa under the Rajinama. The trust, therefore, if any, in respect of that amount must attach only after realisation of the amount and by reason of the acting of the parties subsequent thereto implying acceptance of the obligations under the trust. The mere fact that Periakaruppa agreed to all the terms of the *Rajinama* does not constitute such acceptance. It is at best only indication of a prospective willingness to accept. As already stated there is absolutely no evidence of an actual acceptance after the hundi was cashed and the amount was in fact treated by Chockalingam as an investment in his firm. Indeed even if it be assumed that Periakaruppa became a joint trustee with Chockalingam in respect of the amount belonging to the minor it does not follow that Periakaruppa was responsible for the breach of trust in this case, committed obviously by Chockalingam only. As already stated it appears quite clearly that collection by Chockalingam of the minor's hundi and his keeping custody thereof in his own firm until the amount is regularly invested in other Chetti firms was a matter which was under the initial contemplation of everybody concerned and in particular of the father and the mother who are his natural guardians. That this was the position as late as July, 1928, is quite clear from the evidence of Chockalingam's clerk, Somasundaram, P.W. 2. Periakaruppa died in July, 1929, about an year later. There is absolutely nothing to indicate that the provisional retention of the amount in Chockalingam's firm for that period, was unreasonable or that Periakaruppa had any notion that Chockalingam was financially in embarrassed circumstances and that he made use of the funds. It is true that under law, the investment of funds by a trustee with himself would constitute breach of trust. But before a co-trustee can be made liable therefor some kind of knowledge or connivance or gross negligence or the like contributing factor on his part has got to be made out.

It may be that in this case the minor's funds have been frittered away by the embarrassed circumstances of Chockalingam in whom everybody seems to have reposed confidence. If that was in fact what happened it may be unfortunate for the minor. But that cannot be any reason for affecting Periakaruppa or his estate with the liability for Chockalingam's breach on an assumed construction of what appears at best to be equivocal and ambiguous language in the *Rajinama*. The burden is on the plaintiff, junior Periakaruppa to make out clearly that by the *Rajinama* Periakaruppa became a trustee for the minor's fund and incurred liability therefor for his co-trustee's breach. At the time of the compromise the minor was less than two years in age. Periakaruppa was more anxious to get rid of all his liabilities arising from his son's past and wanted his son's family to clear out bag and baggage from the family house. In such a situation if he was anxious for the minor boy's welfare to the extent of taking responsibility for his money on himself though it be jointly with Chockalingam, clearer and decisive language was to be expected. In our opinion this has not been made out. Hence this suit of the plaintiff, junior Periakaruppa, also fails, against Ranganatha and his minor son.

The appeal is accordingly allowed and the suit is dismissed as against defendants 1 and 2 with costs throughout.

Govinda Menon, J.—I am in perfect agreement with the reasoning and conclusions contained in the judgment of my learned brother B. Jagannadhadas, J., in Civil Appeal No. 169 of 1956, and I agree that the appeal be allowed with costs.

In Appeal No. 104 of 1954 I have considerable doubts regarding the construction of clause (3) of Exhibit P-1. If Periakaruppa and Chockalingam were entrusted with the duty of investment, there can be no doubt whatever that they are constituted trustees. The *Tamil* expression '*Koduthu Vanghi*' clearly signifies investment, but the question is who is to make the investment. If Periakaruppa and Chocka-

lingam have merely to supervise the investment, as the *Tamil* expression '*Mel-Parthu*' means, and not actually invest the amount then the view taken by my learned brothers is right. I am inclined to think, that the duty of investment is cast on Periakaruppa and Chockalingam, but as this is a matter which is not free from doubt, not without hesitation, I agree with the order passed by my learned brothers.

Appeals allowed. Suits dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, B. P. SINHA, J. L. KAPUR AND A. K. SARKAR, JJ.

Macherla Hanumantha Rao and others .. *Appellants**

v.

State of Andhra Pradesh .. *Respondent.*

Union of India .. *Intervener.*

Criminal Procedure Code (*V of* 1898), *sections* 207 *and* 207-*A*—*Constitutionality*—*Article* 14 *of the Constitution, if contravened.*

Where it was contended that the procedure prescribed under sections 207 and 207-A (introduced by Central Act XXVI of 1955) in the Criminal Procedure Code for commitment proceedings was different from that under section 208 and the following sections and that it was discriminatory, as offending Article 14 of the Constitution and hence unconstitutional.

Held :—The Legislature has provided for a clear classification between the two kinds of proceedings at the commitment stage based upon a relevant consideration, namely, whether or not there has been a previous enquiry by a responsible public servant whose duly is to discover crime and to bring criminals to speedy justice. The basis of classification is clearly connected with the underlying principles of administration of justice that an alleged criminal should be placed on his trial as soon after the commission of the crime as circumstances of the case would permit. This classification cannot be held to be unreasonable and not to have any relation to the object of the legislation, namely, speedy trial without unreasonable delay.

Thus there is no discrimination and Article 14 is not contravened. The impugned provisions must be held to be constitutional.

Budhan Choudhry and others v. *The State of Bihar*, (1955) S.C.J. 163: (1955) 1 S.C.R. 1045 (1049) ; and *Matajog Dobey* v. *H. C. Bari*, (1956) S.C.J. 110 : (1956) 1 M.L.J. (S.C.) 79 : (1956) An.W.R. (S.C.) 79 : (1955) 2 S.C.R. 925, applied.

Appeal from the Judgment and Order dated the 28th September, 1956, of the former Andhra High Court at Guntur in Criminal Revision Case No. 241 of 1956.

T. V. Sarma, K. Ramaseshayya Chaudhury and *T. S. Venkataraman*, Advocates for Appellants.

T. V. R. Tatachari and *T. M. Sen*, Advocates, for Respondent.

C. K. Daphtary, Solicitor-General of India, *T. M. Sen*, Advocate, with him for Intervener.

The Judgment of the Court was delivered by

Sinha, J.—The only question that arises for determination in this appeal on a certificate granted by the High Court of Andhra Pradesh at Hyderabad, under Article 134 (1) (*c*) of the Constitution, is the constitutionality of the provisions of sections 207 and 207-A, Code of Criminal Procedure (hereinafter referred to as the Code), which, read together, were introduced into the Code by Act XXVI of 1955. The 26 appellants have been committed to the Court of Session, Guntur Division, to take their trial for offences punishable under sections 147, 148, 323, 324 and 302, read with sections 34 and 149, Indian Penal Code. They impleaded the State of Andhra Pradesh as the sole respondent. The Union of India has been allowed to intervene on an application made in that behalf in view of the fact that the provisions of the Central Act have been impugned as unconstitutional.

* Criminal Appeal No. 57 of 1957. 17th September, 1957.

For the purposes of this appeal, it is only necessary to state the following relevant facts : The local police took cognizance of a serious occurrence of rioting with murder on December 22, 1955. The local police investigated the case, and after recording such evidence as it could collect in respect of the occurrence, submitted a charge-sheet under the aforesaid sections of the Indian Penal Code, to the magistrate having jurisdiction to entertain the case. The magistrate, following the procedure laid down in section 207-A of the Code, committed the persons shown in the charge-sheet as the accused persons, to take their trial before the Court of Session. A number of applications in revision under sections 435 and 439 of the Code were made on behalf of the accused persons, to the High Court of Andhra Pradesh, to quash the order of commitment, chiefly on the ground that the said order having been passed under the provisions of section 207-A of the Code, was void, as those provisions were unconstitutional for the reason that they introduced discrimination as against accused persons in respect of whom a police charge-sheet had been submitted. The revisional applications were heard by Krishna Rao, J., who dismissed them, holding that the provisions impugned were not unconstitutional and that, therefore, the order of commitment was valid in law. The appellants applied for and obtained the necessary certificate under Article 134 (1) (*c*) of the Constitution that the case was a fit one for appeal to this Court.

The arguments addressed to the High Court have been repeated in this Court and are to the effect that sections 207 and 207-A, as they now stand, provide for two separate procedures in the committing Court, namely, (1) in respect of a case instituted on a police report for which the procedure specified in section 207-A is prescribed, and (2) in respect of any other proceeding, the procedure laid down in other provisions of Chapter XVIII is prescribed. The argument is that a comparison and contrast of the two different procedures prescribed in respect of the two classes of cases, when examined in their details, show that the procedure in respect of a case instituted on a police report is less advantageous to the accused than the other procedure. Thus, it is further argued, in the sections following section 207-A in Chapter XVIII of the Code, the accused have been granted facilities which are not available to them in the procedure laid down in section 207-A. By way of illustration, it was urged that under section 208 (3), it is open to an accused person to apply to the magistrate to issue process to compel the attendance of any witness or the production of any document, but sub-section (2) of section 207-A, which corresponds to the provisions of section 208 (3), speaks only of the prosecution and not of the accused. Again, it is pointed out that sub-section (4) of section 207-A, makes reference only to the prosecution evidence, whereas the corresponding section 208 (1) makes reference to the evidence that may be produced in support of the prosecution or on behalf of the accused. Similarly, it has been pointed out that there are no provisions in section 207-A corresponding to those of section 209 (2) and section 213(2), empowering the magistrate to discharge the accused ; nor is there any provision in the impugned section 207-A corresponding to section 215 relating to quashing of commitments. Further, it was pointed out that whereas section 209 (1) contains the words "not sufficient grounds for committing the accused persons", sub-section (6) of section 207-A, has the words "no grounds for committing the accused". It has further been argued that in the new procedure adopted in the impugned section 207-A, the accused person has been deprived of the benefits under sections 162 and 215 of the Code, and under sections 27, 101 to 106 and 114, *Illustration* (*g*) of the Evidence Act. It has, thus, been sought to be made out that the procedure laid down in section 207-A in the matter of commitment is less advantageous to the accused persons than the one prescribed in the succeeding sections of Chapter XVIII.

We shall assume for the purpose of examining the constitutionality of the impugned provisions of the amended Code that there are differences in the two kinds of procedure envisaged in Chapter XVIII of the Code, relating to commitment proceedings, but it is by no means clear that the changes introduced by the amending Act XXVI of 1955, are always to the disadvantage or prejudice of an accused

person. It is a well-known fact that the amending Act aforesaid, introduced changes into the old Code with a view to simplifying and expediting procedure relating to trial of offences and to inquiries preceding such trials. It has also to be remembered that the Code has always prescribed different procedures for trial of offences varying with the gravity of the offences charged, or with the power of the Court before which an accused person is placed on trial. Generally speaking, minor offences have been made triable summarily, or the same accused person in respect of an offence triable summarily, may be so tried by a magistrate specially empowered in that behalf, or may be tried according to the ordinary procedure by a magistrate not so empowered. Less serious offences are triable by magistrates and more serious offences are triable by a Court of Session or by a High Court after there has been a preliminary inquiry and investigation by a police officer, or an inquiry by a magistrate, commonly described as commitment proceedings, or, after inquiry by a Civil or Revenue Court, in connection with certain specified offences committed in the course of or in relation to judicial proceedings or in respect of proceedings affecting the administration of justice. The Code has further classified offences triable by magistrates of any class or by magistrates of higher classes. There is, again, a cross-division of cases into warrant cases and summons cases. With reference to the powers of police officers, offences have been classified as cognizable offences and non-cognizable offences. Thus, the principle of classification of offences and of different categories of cases relating to the trial of offences is a well-established rule of criminal procedure. It is true that for the first time, the impugned sections have prescribed two different procedures in respect of commitment proceedings as already indicated, but we have to remember that there is absolutely no difference in the *procedure at the trial* in contra-distinction to the procedure relating to the enquiry leading upto commitment of an accused person to a Court of Session or a High Court in cases triable exclusively by such a Court. It must also be remembered that every case involving a serious offence comes under the category of ' cognizable case ' in respect of which a police officer may arrest a person named as an accused person without warrant and investigate the case without any order of a magistrate in that behalf. Hence, ordinarily speaking, as soon as information of the commission of a cognizable offence has been laid before a police officer-in-charge of a police station, it becomes his duty to record the first information ; and even in the absence of such a first information if such an officer receives information leading to a suspicion that a cognizable offence has been committed, he has to investigate the case and take all steps necessary for the apprehension and arrest of the persons alleged to have been concerned with the crime. Even in cases which are not, in the first instance, of cognizable nature, it becomes the duty of a police officer to investigate such a case if he is so ordered by a competent magistrate, taking cognizance of the offence under section 190 of the Code. In all such cases, it becomes the duty of a police officer in charge of a police station, or of a superior officer if deputed to investigate a case, to follow the procedure laid down in Chapter XIV of the Code. Under section 169 of the Code, if, as a result of the investigation under Chapter XIV, the police officer making the investigation, comes to the conclusion that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, he has to release the accused person if in custody. If, on the other hand, on such an investigation, it appears to the investigating officer that there is sufficient evidence or reasonable ground of suspicion, it becomes his duty to forward the accused to a competent magistrate to try the accused or to commit him for trial. Section 173 of the Code requires the investigation to be concluded without any unnecessary delay and the submission of a report containing the result of the investigation, to a competent magistrate. After the submission of the police report, the police officer-in-charge of a police station, before the commencement of the inquiry or trial by a magistrate, has to furnish to the accused, free of cost, a copy of the report aforesaid, of the first information report and of all other documents or relevant extracts thereof, on which prosecution proposes to rely, including statements and confessions, if any, recorded under section 164, and the statements recorded under sub-section (3) of section 161, of all persons whom the prosecution proposes to examine as witnesses.

On receipt of the police report and the documents aforesaid, under section 173 of the Code, the magistrate concerned has to make up his mind whether the case has to be tried by him or by some other competent magistrate or by a Court of Session or a High Court. If the magistrate finds that the case is triable exclusively by a Court of Session or a High Court, he has to follow the new procedure laid down in section 207-A. At the commencement of the inquiry before the magistrate, when the accused appears before him, the magistrate has to satisfy himself that the documents referred to in section 173 have been furnished to the accused, and to have them furnished if the police officer has not done his duty. The magistrate, then has to record the evidence of such witnesses as figure as eye-witnesses to the occurrence, and are produced before him. He has also the power, in the interest of justice, to record such other evidence of the prosecution as he may think necessary, but he is not obliged to record any evidence. Without recording any evidence but after considering all the documents referred to in section 173 and after examining the accused person and after hearing the parties, it is open to the magistrate to discharge the accused person after recording his reasons that no ground for committing the accused for trial, has been made out, unless he decides to try the accused himself or to send him for trial by another magistrate. If, on the other hand, he finds that the accused should be committed for trial, he is required to frame a charge disclosing the offence with which the accused is charged. The accused is then required to submit a list of persons whom he wishes to be summoned, to give evidence at his trial. After all this, the case is placed before the Court of Session or the High Court for trial in accordance with the procedure laid down by the Code.

But if the investigating police officer, instead of submitting a charge-sheet as required by section 173, submits what is popularly called the "final report" to the effect that there was no evidence in support of the prosecution case and that it was not a fit case for a trial either by a magistrate or by a Court of Session or High Court, the matter may not end there. It is open to the first informant or any other person interested in prosecuting the accused person, to make a regular petition of complaint before a competent magistrate under section 190 of the Code. The magistrate, upon taking cognizance under that section, may start an inquiry of his own, notwithstanding the fact that the police has refused to prosecute the case. The magistrate, in a case triable exclusively by a Court of Session or by a High Court, has to follow the procedure laid down in section 208 and subsequent sections of Chapter XVIII. The magistrate naturally has to make a record of the evidence given by the complainant and such other witnesses as may have been produced in support of the prosecution or on behalf of the accused if the accused chooses to adduce any evidence at that stage. Ordinarily, an accused person does not choose to do so for the fear that he might disclose his defence too early. After recording the evidence adduced on behalf of the prosecution as also on behalf of the accused, if adduced, and examining the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the magistrate may either discharge the accused person if he finds that there is no sufficient ground for committing him for trial after recording his reasons, or direct him to be tried by himself or some other magistrate. The order of discharge may be made by the magistrate even at an earlier stage if he records the reasons for considering the charge to be groundless, or, he may commit the accused for trial after framing a charge declaring the offence with which the accused has been charged. It is also open to an accused person, if the magistrate in his discretion allows him to do so, to examine more witnesses. If after examining those additional witnesses, the magistrate is satisfied that there are no sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

It will, thus, be seen that where the magistrate conducts commitment proceeding as on a complaint, the accused has the advantage of three stages at which he may be discharged. It has, therefore, been contended on behalf of the appellants that the procedure under section 207-A is less advantageous to the accused than the other procedure. The answer to this contention is that the Legislature

in its wisdom, has proceeded on the basis that it is primarily the function of the State through its police officers who are charged with the duty of preventing the commission of crime and of bringing offenders to justice, to prosecute criminals or alleged criminals in serious cases, that is to say, cases involving not only personal injury to the complainant but also public peace and order. Such police officers have been enjoined by law to see to it that all persons alleged to have been concerned in a crime of that character, should be speedily brought to justice. Chapter XIV of the Code, as stated above, lays down the procedure which police officers have to follow. Hence, the Code has provided that all cases involving public peace and order, should be investigated by public servants who are expected to be vigilant in bringing all offenders to justice without any avoidable delay. If the police have not thought it necessary or feasible to do so after following the procedure laid down in Chapter XIV, the private party may figure before the magistrate as complainant. The magistrate has got, therefore, to be more vigilant in seeing that private vendetta and considerations other than those of vindicating justice, are not allowed to interfere with the administration of public justice. Hence, the procedure laid down in section 208 and the sections following that section, naturally gives greater facilities to persons accused of an offence, to vindicate their character.

As indicated above, there is no doubt that there are material differences in the two procedures relating to commitment according as the case has been investigated by a competent police officer who has submitted a charge-sheet and a report under section 173 of the Code, or, a competent magistrate has taken cognizance of an offence on a complaint. In the latter case, the procedure before the committing magistrate is more elaborate. But is it always to the advantage of an accused person that there should be an elaborate procedure before such a magistrate and not a summary one? It is the avowed policy of the Legislature and there can be no doubt that it is in the general interest of administration of justice, that crimes should be investigated and criminals brought to justice as expeditiously as circumstances of the case would permit. That must also be in the interest of an accused person himself if he claims not to be guilty of any offence. Generally speaking, therefore, only a real offender would be interested in prolonging the inquiry or trial so as to postpone the day of judgment. If a person has been falsely or wrongly accused of an offence, it is in his interest that he should get himself declared innocent by a competent Court as early as possible. In view of these considerations, there cannot be the least doubt that the Legislature has been well-advised to amend the procedure relating to commitment proceedings in cases which have been investigated by a competent police officer. The Legislature has rightly retained the old elaborate procedure only in those cases which have not been investigated by such a public officer, or, after investigation, have been declared not to be fit to be proceeded with in public interest.

Having found that there are substantial differences introduced by the impugned provisions, we have to consider the question of the constitutionality of those provisions. At the threshold, it is pertinent to observe that these provisions have not in any way, affected the procedure at the trial. After a case has been committed to a Court of Session, the procedure for the trial of offences in either class of cases, remains the same. Hence, all those cases which came up to this Court in which it was laid down that the law introduced substantial changes in the procedure at the trial, to the disadvantage of an accused person, have absolutely no relevance to the present case. The main attack on the constitutionality of those provisions is based on Article 14 of the Constitution. This Court had to consider the provisions of that article in a series of cases; namely, *Chiranjit Lal Chowdhuri* v. *The Union of India*[1], *The State of Bombay* v. *F. N. Balsara*[2], *The State of West Bengal* v. *Anwar Ali Sarkar*[3], *Kathi Raning Rawat* v. *The State of Saurashtra*[4], *Lachmandas*

1. (1951) S.C.J. 29 : (1950) S.C.R. 869.
2. (1951) S.C.J. 478 : (1951) S.C.R. 682.
3. (1952) S.C.J. 55 : (1952) S.C.R. 284.
4. (1952) S.C.J. 168 : (1952) S.C.R. 435.

Kewalram Ahuja v. *The State of Bombay*[1], *Qasim Razvi* v. *The State of Hyderabad*[2], *Habeeb Mohamad* v. *The State of Hyderabad*[3], *The State of Punjab* v. *Ajaib Singh*[4], which were all referred to in the case of *Budhan Choudhry and others* v. *The State of Bihar*[5], which is the nearest case to the case now before us, with this distinction that in that case, there was a difference at the trial stage itself. In that case, the same accused person in respect of the same offence, could be tried under section 30 of the Code by a magistrate empowered under that section, and by a Court of Session, if the offence happened to have taken place in a jurisdiction to which section 30 had not been applied. In that case, this Court upheld the constitutionality of that section of the Code, and repelled the contention that the provisions of that section infringed the fundamental right to equality guaranteed by Article 14 of the Constitution. In the course of his judgment, Das, J., (as he then was) made the following observations which apply to the case in hand with full force :

> ". . . . . . . It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis ; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well-established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The later case before this Court dealing with the question of discrimination in respect of provisions of the Code is the one reported in *Matajog Dobey* v. *H. C. Bhari*[6]. In that case, the constitutionality of section 197 of the Code was questioned. The contention raised in that case was that the section vested arbitrary power in the Government to grant or withhold sanction which could be withheld or granted at the sweet will of the Executive. This Court overruled that contention and held that a discretionary power is not necessarily discriminatory.

Applying the principles laid down by this Court to the case in hand to judge whether or not there has been objectionable discrimination, there could not be the least doubt that the Legislature has provided for a clear classification between the two kinds of proceedings at the commitment stage based upon a very relevant consideration, namely, whether or not there has been a previous inquiry by a responsible public servant whose duty it is to discover crime and to bring criminals to speedy justice. This basis of classification is clearly connected with the underlying principle of administration of justice that an alleged criminal should be placed on his trial as soon after the commission of the crime as circumstances of the case would permit. This classification cannot be said to be unreasonable and not to have any relation to the object of the legislation, namely, a more speedy trial of offences without any avoidable dealy.

For the reasons given above, it must be held that there is no discrimination and that the provisions of Article 14 of the Constitution, have not been contravened. The provisions of the Code, impugned in this case, must, therefore, be held to be constitutional. The appeal is, accordingly, dismissed.

Appeal dismissed.

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1. (1952) S.C.J. 339 : (1952) S.C.R. 716.
2. (1953) S.C.J. 255 : (1953) S.C.R. 581.
3. (1953) S.C.J. 361 : (1953) S.C.R. 661.
4. (1952) S.C.J. 664 : (1953) S.C.R. 254.
5. (1955) S.C.J. 163 : (1955) S.C.R. 1045, 1049.
6. (1956) S.C.J. 110 : (1956) 1 M.L.J. (S.C.). 79 : (1956) An.W.R. (S.C.) 79 : (1955) 2 S.C.R. 925.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—N. H. BHAGWATI, S. K. DAS AND P. B. GAJENDRAGADKAR, JJ.

Mangoo Singh .. *Appellant**

v.

The Election Tribunal, Bareilly and others .. *Respondents.*

Uttar Pradesh Municipalities Act (II of 1916), section 13-D—True scope, interpretation and effect—" Shall be disqualified from being chosen as "—Crucial time—Demand to which section 166 applies' in clause (g)—Construction—Second proviso to clause (g)—Effect of.

An identical expression " shall be disqualified from being chosen as " in section 7 of the Representation of the People Act, 1951, was considered in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram,* (1954) S.C.J. 315 : (1954) S.C.R. 817; and it was held that the *choice* is made by a series of steps starting with nomination and ending with the announcement of the election and therefore if a disqualification attaches to a candidate at any one of these stages, he cannot be chosen. If a person is disqualified on the date of nomination he cannot be chosen as a candidate because the disqualification mentioned in section 13-D attaches to him on that date. *N. P. Ponnuswami* v. *The Returning Officer Namakkal,* (1952) S.C.J. 100 : (1952) S.C.R. 218 : (1952) 1 M.L.J. 775, referred.

The provision in paragraph 22 (2) (*b*) of Uttar Pradesh Municipalities (Conduct of Election of Members) Order, 1951, also lends support to the view that the starting point is not the date of polling only.

It is not correct to say that by reason of proviso 2 to clause (*g*) the transient disqualification on the date of nomination ceases on payment of arrears before the date of polling. *Harford* v. *Linskey,* L.R. (1899) 1 Q.B. 852 (858), relied. *Ahmed Hussain* v. *Aswini Kumar,* A.I.R. 1953 Cal. 542, approved.

The expression " to which section 166 applies " in clause (*g*) of section 13-D merely expresses the nature of the demand referred to in clause (*g*) *i.e.,* a demand of the nature and type mentioned in one or other of the three clauses in section 166 (1) of the Act; further it is not essential that a notice of demand under section 168 should have been made. In the context " demand " in clause (*g*) simply means a " claim " or " due " without importing the further meaning of calling upon the person liable to pay.

Appeal from the Judgment and Order, dated the 30th August, 1955, of the Allahabad High Court in Special Appeal No. 8 of 1955 arising out of the Judgment and Order, dated the 10th December, 1954, of the Single Judge of the Allahabad High Court in Civil Misc. Writ No. 1245 of 1954.

R. S. Narula, Advocate, for Appellant.

B. B. Tawakley, Senior Advocate (*K. P. Gupta,* with him), for Respondent No 3.

The Judgment of the Court was delivered by

S. K. Das, J.—This appeal has been preferred to this Court on the strength of a certificate granted by the High Court of Allahabad on February 3, 1956, to the effect that the case is a fit one for appeal to the Supreme Court under Article 133 (1) (*c*) of the Constitution. The question that falls for decision is the true scope, meaning and effect of clause (*g*) of section 13-D of the U. P. Municipalities Act (U. P. Act No. II of 1916), hereinafter referred to as the Act.

The relevant facts, which are not now in dispute, are these. There was a general election to the Municipal Board of Bareilly in October 1953. The appellant, Mangoo Singh, and respondent No. 3, Imdad Husain, along with several others, were candidates at the said election from Ward No. 15. The date fixed for filing nominations was October 5, 1953, and the date for scrutiny of the nominations filed was October 7, 1953. The appellant and respondent No. 3 both filed their nominations on the due date, and at the time of scrutiny Imdad Husain raised an objection to the nomination of the appellant on the ground that the latter was disqualified under clause (*g*) of section 13-D of the Act for being chosen as a member of the said Municipal Board because he was in arrears in the payment of municipal tax in excess of one year's demand. This objection was dismissed, and the nomination of the appellant was accepted by the Assistant Returning Officer.

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*Civil Appeal No. 8 of 1957. 17th September, 1957.

The poll took place on October 26, 1953, and the counting of votes was done on October 29, 1953. Four persons were to be elected from the said Ward, and the appellant was the third in the list by reason of the number of votes which he had obtained. Imdad Husain was fifth in the list. Accordingly, the appellant was declared as one of the returned candidates, and Imdad Husain was at the top of the unsuccessful candidates. Imdad Husain then filed an election petition to set aside the election of the present appellant on various grounds. The only ground with which we are now concerned is the disqualification under clause (*g*) of section 13-D of the Act. This election petition was heard by the Election Tribunal and by its judgment, dated October 20, 1954, the Election Tribunal held that the appellant was in arrears in the payment of municipal tax in excess of one year's demand to which section 166 of the Act applied and therefore came under the disqualification in clause (*g*) of section 13-D of the Act. It further held that the payment of a sum of Rs. 115-3-0 on October 10, 1953, five days after the date fixed for the filing of nominations, did not wipe off that disqualification, and the appellant was not entitled to the benefit of the second proviso to section 13-D of the Act. It may be here stated that the Election Tribunal also held that no bill for payment of the tax was presented to the appellant as required by section 166, nor was any demand notice served on him as required by section 168 of the Act. On the above findings, the Tribunal allowed the election pettion, set aside the election of the appellant and declared a casual vacancy under clause (*a*) of sub-section (2) of section 25 of the Act, which vacancy was subsequently filled up by the election of the third respondent on April 5, 1955. The next general election in the Municipality is due in October, 1957.

Against the decision of the Election Tribunal, the appellant moved the High Court of Allahabad for the issue of a writ under Article 226 of the Constitution. The main point urged by the appellant was that the Election Tribunal was in error in its interpretation of clause (*g*) of section 13-D of the Act. Chaturvedi, J., who dealt with the application of the appellant, agreed with the view of the law as expressed by the Election Tribunal and dismissed the application. The appellant then preferred an appeal to a Division Bench of the said High Court. This appeal was also dismissed by Agarwala and Sahai, JJ., by their judgment, dated August 30, 1955. The appellant then moved and obtained a certificate of fitness under Article 133 (1) (*c*) of the Constitution from the said High Court.

Learned counsel for the appellant has not contested any of the findings of fact arrived at by the Election Tribunal and has confined his submissions to the question of the true construction of clause (*g*) of section 13-D of the Act. Therefore, it is necessary to read that section, in so far as it is relevant for our purpose :

> " 13-D. *Disqualifications for membership.*—A person, notwithstanding that he is otherwise qualified, shall be disqualified for being chosen as, and for being, a member of a board if he—
>
> (*a*) ....
> (*b*) ....
> (*c*) ....
> (*d*) ....
> (*e*) ....
> (*f*) ....
>
> (*g*) is in arrears in the payment of municipal tax or other dues in excess of one year's demand to which section 166 appplies :
>
> ....
>
> Provided further that in the case of (*g*) the disqualification shall cease as soon as the arrears are paid."

The first contention of learned counsel for the appellant relates to and arises out of the expression " for being chosen as " occurring in the section. The argument is this. It is submitted that a person is " chosen as a member of a board " when the poll takes place and a majority of voters vote for him as their chosen candi-

date; therefore, the relevent date for the operation of the disqualification is the date of the poll, and inasmuch as on October 10, 1953, which was several days before the date of the poll, the appellant was no longer in arrears of municipal tax in excess of one year's demand by reason of the payment made on that date, the disqualification did not attach to him on the date of the poll. We are unable to accept this argument. It is worthy of note that an identical expression "shall be disqualified for being chosen as" occurs in Article 102 of the Constitution and section 7 of the Representation of the People Act, 1951. This expression occurring in section 7 of the Representation of the People Act, 1951, was considered by this Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*[1]. In that case the question was when the disqualification mentioned in clause (*d*) of section 7 of the Representation of the People Act, 1951, arose and it was held that the date for putting in the nominations was one of the crucial dates. On this point, the following observations made in that case are apposite:

> "Now the words of the section are "shall be disqualified *for being chosen*". The choice is made by a series of steps starting with the nomination and ending with the announcement of the election. It follows that if a disqualification attaches to a candidate at any one of these stages, he cannot be chosen."

It was pointed out in *N. P. Ponnuswami* v. *The Returning Officer, Namakkal Constituency, Namakkal, Salem District*[2], that 'election' is a continuous process consisting of several stages and embracing many steps of which nomination is one; nomination is the foundation of a candidate's right to go to the polls and must be treated as an integral part of the election. If a person is disqualified on the date of nomination, he cannot be chosen as a candidate because the disqualification mentioned in section 13-D attaches to him on that date.

This is also clear from para. 22 (2) of the U. P. Municipalities (Conduct of Election of Members) Order, 1953. That sub-para. states—

> "22 (2)—The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds:
>
> (*a*) that the candidate is not qualified to be chosen to fill the seat under the Act; or
>
> (*b*) that the candidate is disqualified for being chosen to fill the seat under the Act; or
>
> (*c*) that there has been any failure to comply with any of the provisions of paras. 16 and 17; or
>
> (*d*) that the signature of the candidate or any proposer or seconder is not genuine or has been obtained by fraud."

If the disqualification of clause (*g*) of section 13-D of the Act is to come into operation only on the date of the poll, then it is quite unnecessary for the Returning Officer to consider that disqualification at the time of scrutiny; and indeed it will be improper for him to refuse nomination on the ground of such disqualification. Clause (*b*) of para. 22(2) uses the same expression "disqualified for being chosen"—showing clearly enough that the starting point of the act of choosing is not on the date of the poll only. The process of choosing commences on the date of filing nominations.

We now turn to the second proviso to section 13-D. The submission of learned counsel for the appellant is that, as stated in the proviso, the disqualification is transient and ceases to operate as soon as the arrears are paid: on October 10, 1953, the appellant was no longer disqualified and therefore, he could be chosen on the date of the poll, that is, on October 26, 1953. The argument is that in the case of such a transient disqualification, the second proviso must be so read as to mean that a disqualification subsisting on the day of nomination can be wiped off completely by subsequent payment of arrears of tax; otherwise a disqualification at the time of nomination will disentitle a person to stand for election; even though it ceases to operate before the day of the poll. This argument also we cannot accept

1. (1954) S.C.J. 315 : (1954) S.C.R. 817. (1952) S.C.R. 218.
2. (1952) S.C.J. 100 : (1952) 1 M.L.J. 775 :

as correct; it is really the first argument in a different form. The wiping off of the disqualification under the second proviso has no retrospective effect, and the disqualification which subsisted on the day of filing nominations did not cease to subsist on that day by reason of a subsequent payment of the arrears of municipal tax. On this point we accept as correct the view expressed in *Ahmed Hossain* v. *Aswini Kumar*[1], where a similar question under the Bengal Municipal Act (Ben. XV of 1932), fell for consideration. The question was if a person disqualified on the date of nomination could shake off his pre-existing disqualification by acquiring a new right between the date of nomination and the date of scrutiny. What happened in that case was this: on the material date, that is, the last date for submission of nominations, a person was in arrears for more than three months in payment of the tax which he was liable to pay, and he came within the mischief of clause (*g*) of amended section 22(1) of the Bengal Municipal Act. The contention was that the name of the Press of which the candidate was the proprietor and not his name was recorded in the books of the Municipality as the assessee and that the name of the candidate was in the electoral roll by reason of his educational qualifications. This contention was repelled and it was observed that if a person was disqualified on the date of the nomination, he could not shake off his pre-existing disqualification by acquiring a new right between the date of nomination and the date of scrutiny. There is also other judicial authority which supports the same view. In *Harford* v. *Linskey*[2], a similar question arose for decision under the Municipal Corporations Act, 1882, section 12, whereof enacted that "a person shall be disqualified for being elected and for being a councillor" if and while he is interested in contracts with the Corporation. The petitioner in that case admitted that at the time of his nomination he was interested in contracts with the Corporation, but contended that he could and would have got rid of his disqualification before the day fixed for the poll, and was therefore not disqualified for nomination. The question was whether he was so disqualified. Wright, J., delivering the judgment of the Court observed—

> "In the absence of any guide, we think it safest to hold that in cases of elections under the Municipal Corporations Acts a person, who at the time of the nomination is disqualified for election in the manner in which this petitioner was disqualified, is disqualified also for nomination. The nomination is for this purpose an essential part of the election, and if there are no competitors it of itself constitutes the election by virtue of the express words of section 56. A different construction might produce much confusion. On the nomination day no one could know whether the persons nominated will at the poll be effective candidates or not. It is true that in the case put the disqualification may be removed before the election is completed; but what is to be the effect if the disqualification continues until the poll begins, or until the middle of the polling day, or until the close of the poll? Will votes given before the removal of the disqualification be valid? If not, how is the number of them to be ascertained? It seems to us unreasonable to hold that the Act means to leave the matter in such a state of uncertainty, and for these reasons we think that this petitioner was disqualified for nomination or election."

The same state of uncertainty and confusion, to which a reference has been made in the aforesaid observations, will arise if the construction which learned counsel for the appellant has pressed for our acceptance is adopted in the case before us.

Lastly, it has been argued on behalf of the appellant that the expression 'to which section 166 applies' in clause (*g*) of section 13-D means that a bill of the sum due must be presented to the person liable for it, as required by that section, before he can come within the mischief of the clause; furthermore, the use of the expression 'demand' makes it essential that a demand notice must also be served as required by section 168 of the Act. As on the finding of the Election Tribunal neither a bill was presented to the appellant, nor was he served with a demand notice, learned counsel contends that the appellant does not come within the mischief of the clause.

Sections 166 and 168 are in these terms—

"*Section* 166: *Presentation of bill.*—(1) As soon as a person becomes liable for the payment of—

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1. A.I.R. 1953 Cal. 542.

2. L.R. (1899) 1 Q.B. 852, 858.

(a) any sum on account of a tax, other than an octroi or toll or any similar tax payable upon immediate demand, or

(b) any sum payable under clause (c) of section 196 or section 229 or section 230 in respect of the supply of water, or payable in respect of any other municipal service or undertaking, or

(c) any other sum declared by this Act or by rule (or bye-law) to be recoverable in the manner provided by this chapter, the board shall, with all convenient speed, cause a bill to be presented to the persons so liable.

(2) Unless otherwise provided by rule, a person shall be deemed to become liable for the payment of every tax and licence fee upon the commencement of the period in respect of which such tax or fee is payable."

"*Section* 168: *Notice of demand*.—If the sum for which a bill has been presented as aforesaid is not paid in municipal office, or to a person empowered by a regulation to receive such payments, within fifteen days from the presentation thereof, the board may cause to be served upon the person liable for the payment of the said sum a notice of demand in the form set forth in Schedule IV, or to the like effect."

We are clearly of the view that the expression 'to which section 166 applies' cannot bear the meaning sought to be given to it on behalf of the appellant. That expression merely describes the nature of the demand referred to in clause (*g*). Section 166 refers to three types of dues: clause (*a*) of sub-section (1) refers to any sum on account of a tax other than an octroi or toll or any similar tax payable upon immediate demand; clause (*b*) refers to sums payable under clause (*c*) of section 196 or section 229 or section 230 in respect of the supply of water, etc., and clause (*c*) refers to any other sum declared by the Act or by rule or bye-law to be recoverable in the manner provided by Chapter VI. The demand to which section 166 applies must be a demand of the nature or type mentioned in one or other of the aforesaid three clauses, and the demand referred to in clause (*g*) of section 13-D must be of that nature or type; this, in our view, is the true meaning and effect of the expression 'to which section 166 applies'.

Nor do we think that the word 'demand' attracts the operation of section 168. It may be readily conceded that the word 'demand' ordinarily means something more than what is due; it means something which has been demanded, called for or asked for. But the meaning of a word must take colour from the context in which it is used. In clause (*g*) the context in which the word 'demand' is used has a very obvious and clear reference to the amount of arrears or dues on which the disqualification depends; therefore, the expression used is—'arrears in the payment of municipal tax or other dues in excess of one year's demand'. The word 'demand' in that context and in the collocation of words in which it has been used can only mean 'in excess of one year's municipal tax or other dues'. We have been referred to several meanings of the word 'demand' in Standard English Dictionaries and Law Lexicons. When the context makes the meaning of a word quite clear it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers. It is sufficient for our purpose to state that even in Standard Dictionaries and Law Lexicons, it is well recognised that the word 'demand' may mean simply a 'claim' or 'due', without importing any further meaning of calling upon the person liable to pay the claim or due.

For the reasons given above, we hold that not one of the contentions urged on behalf of the appellant is worthy of acceptance. The Election petition was rightly decided, as the appellant was disqualified for being chosen as a member of the Municipal Board in question on the day he filed his nomination, under clause (*g*) of section 13-D of the Act. Accordingly, the appeal is dismissed with costs in favour of respondent 3 who alone contested the appeal before us.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, B. P. SINHA, J. L. KAPUR AND A. K. SARKAR, JJ.

Union of India .. *Appellant**

v.

T. R. Varma .. *Respondent.*

Constitution of India (1950), *Article* 226—*Discretion of Court—Wrongful termination of service—Appropriate remedy is by suit.*

Evidence Act (*I of* 1872)—*Applicability—Enquiries by Tribunals—Rules of natural justice to be observed.*

Practice—What happened in Court or Tribunal—Conflicting statements of party and Presiding Officer—Preference.

In a suit by a person whose services were wrongfully terminated the Court will be competent to award all the reliefs including some not admissible in a Writ Petition. It would be sound exercise of discretion in such a case to refuse to interfere in a petition under Article 226 unless there are good grounds therefor.

In the instant appeal, the High Court having decided on the merits and in view of the fact that a suit would be barred at the time, it was heard on the merits.

The Evidence Act has no application to enquiries by Tribunals and the law only requires that rules of natural justice should be observed in the conduct of enquiries and if they do so the decisions of Tribunals are not liable to be impeached.

When there is a dispute as to what happened before a Court or Tribunal and there are conflicting statements of the party and the Presiding Officer, the statement of the latter is generally accepted to be correct.

Appeal by Special Leave from the Judgment and Order, dated the 31st January, 1956, of the Circuit Bench of the Punjab High Court at Delhi in Civil Writ No. 243-D of 1954.

C. K. Daphtary, Solicitor-General of India (*R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates, with him), for Appellant.

Purshottam Tricumdas, Senior Advocate (*T. S. Venkataraman* and *K. R. Chaudhury*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This is an appeal by special leave against the Judgment and Order of the High Court of Punjab in an application under Article 226 of the Constitution setting aside an order, dated September 16, 1954, dismissing the respondent herein, from Government service on the ground that it was in contravention of Article 311 (2) of the Constitution.

The respondent was, at the material dates, an Assistant Controller in the Commerce Department of the Union Government. Sometime in the middle of March, 1953, one Shri Bhan, a representative of a Calcutta firm styled Messrs. Gattulal Chhaganlal Joshi, came to Delhi with a view to get the name of the firm removed from black list in which it had been placed, and for that purpose, he was contacting the officers in the Department. Information was given to Sri Tawakley an assistant in the Ministry of Commerce and Industry (Complaints Branch), that Sri Bhan was offering to give bribe for getting an order in his favour. He immediately reported the matter to the Special Police Establishment, and they decided to lay a trap for him. Sri Bhan, however, was willing to pay the bribe only after an order in his favour had been made and communicated, but he offered that he would get the respondent to stand as surety for payment by him. The police thereafter decided to set a trap for the respondent, and it was accordingly arranged that Sri Tawakley should meet, by appointment Sri Bhan and the respondent in the Kwality Restaurant in the evening on March 24, 1953. The meeting took place as arranged,

*Civil Appeal No. 118 of 1957. 18th September, 1957.

and three members of the Special Police Establishment were present there *incognito*. Then, there was a talk between Sri Tawakley, Sri Bhan and the respondent, and it is the case of the appellant that during that talk, an assurance was given by the respondent to Sri Tawakley that the amount would be paid by Sri Bhan. After the conversation was over, when the respondent was about to depart, one of the officers, the Superintendent of Police, disclosed his identity, got from the respondent his identity card and initialled it, and Sri Bhan also initialled it.

On March 28, 1953 the respondent received a notice from the Secretary to the Ministry of Commerce and Industry charging him with aiding and abetting Sri Bhan in offering illegal gratification to Sri Tawakley and attempting to induce Sri Tawakley to accept the gratification offered by Sri Bhan, and in support of the charges, there were detailed allegations relating to meetings between the respondent and Sri Tawakley on March 17, 1953, on March 21, 1953, a telephonic conversation with reference to the same matter later on that day, and the meeting in the Kwality Restaurant already mentioned. The respondent was called upon to give his explanation to the charges, and he was directed to state whether he wished to lead oral or documentary evidence in defence. The enquiry was delegated to Mr. J. Byrne, Joint Chief Controller of Imports and Exports. On April 10, 1953, the respondent submitted a detailed explanation denying that he met Sri Tawakley either on the 17th or on the 21st March, or that there was any telephonic conversation that day with him, and stating that the conversation which he had in the Kwality Restaurant on the 24th related to an insurance policy of his, and had nothing to do with any bribe proposed to be offered by Sri Bhan. The respondent also asked for an oral enquiry and desired to examine Sri Bhan, Sri Fateh Singh and Sri Jai Narayan in support of his version. On April 17, 1953, Mr. Byrne gave notice to the respondent that there would be an oral enquiry and pursuant thereto, witnesses were examined on April 20, 1953, and the following days, and the hearing was concluded on April 27, 1953.

On July 28, 1953, Mr. Byrne submitted his report, and therein, he found that the charges against the respondent had been clearly established. On this, a communication was issued to the respondent on August 29, 1953, wherein he was informed that it was provisionally decided that he should be dismissed, and asked to show cause against the proposed action. Along with the notice, the whole of the report of Mr. Byrne, omitting his recommendations, was sent. On September 11, 1953, the respondent sent his explanation. Therein, he again discussed at great length the evidence that had been adduced, and submitted that the finding of guilt was not proper, and that no action should be taken against him. He also complained in this explanation that the enquiry was vitiated by the fact that he had not been permitted to cross-examine the witnesses, who gave evidence against him. The papers were then submitted to the Union Public Service Commission in accordance with Article 320, and it sent its report on September 6, 1954, that the charges were made out, that there was no substance in the complaint of the respondent that he was not allowed to cross-examine the witnesses, and that he should be dismissed. The President accepting the finding of the Enquiring Officer and the recommendation of the Union Public Service Commission, made an order on September 16, 1954, that the respondent should be dismissed from Government service.

The respondent then filed the application out of which the present appeal arises, in the High Court of Punjab for an appropriate writ to quash the order of dismissal, dated September 16, 1954, for the reason that there was no proper enquiry. As many as seven grounds were set forth in support of the petition, and of these, the learned Judges held that three had been established. They held that the respondent had been denied an opportunity to cross-examine witnesses, who gave evidence in support of the charge, that further he was not allowed to make his own statement, but was merely cross-examined by the Enquiring Officer, and that likewise, his witnesses were merely cross-examined by the Officer without the respondent himself being allowed to examine them. These defects, they observed

amounted to a denial of reasonable opportunity to the respondent to show cause against his dismissal, and that the order, dated September 16, 1954, which followed on such enquiry, was bad as being in contravention of Article 311 (2). In the result, they set aside the order, and directed him to be reinstated. The correctness of this order is challenged by the Solicitor-General on two grounds : (1) that the finding that the respondent had no reasonable opportunity afforded to him at the enquiry is not supported by the evidence; (2) that even if there was a defect in the enquiry, that was a matter that could be set right in the stage following the show-cause-notice and as the respondent did not ask for an opportunity to cross-examine the witnesses, he could not be heard to urge that the order, dated September 16, 1954, was bad as contravening Article 311 (2).

At the very outset, we have to observe that a Writ Petition under Article 226 is not the appropriate proceeding for adjudication of disputes like the present. Under the law, a person whose services have been wrongfully terminated, is entitled to institute an action to vindicate his rights; and in such an action, the Court will be competent to award all the reliefs to which he may be entitled, including some which would not be admissible in a Writ Petition. It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ ; but as observed by this Court in *Rashid Ahmed* v. *Municipal Board, Kairana*[1], " the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs ". *Vide* also *K. S. Rashid and Son* v. *The Income-tax Investigation Commission*[2]. And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds therefor. None such appears in the present case. On the other hand, the point for determination in this petition whether the respondent was denied a reasonable opportunity to present his case, turns mainly on the question whether he was prevented from cross-examining the witnesses, who gave evidence in support of the charge. That is a question on which there is a serious dispute, which cannot be satisfactorily decided without taking evidence. It is not the practice of Courts to decide questions of that character in a writ petition, and it would have been a proper exercise of discretion in the present case if the learned Judges had referred the respondent to a suit. In this appeal, we should have ourselves adopted that course, and passed the order which the learned Judges should have passed. But we feel pressed by the fact that the order dismissing the respondent having been made on September 16, 1954, an action to set it aside would now be time-barred. As the High Court has gone into the matter on the merits, we propose to dispose of this appeal on a consideration of the merits.

The main ground on which the respondent attacked the order dated September 16, 1954, was that at the enquiry held by Mr. Byrne, he was not given an opportunity to cross-examine the witnesses, who deposed against him, and that the findings reached at such enquiry could not be accepted. But the question is whether that allegation has been made out. In para. 7 of his petition, the respondent stated :

> " Despite repeated verbal requests of the petitioner, the Inquiry Officer did not permit him to cross-examine any witness, who deposed against him."

But this was contradicted by Mr. Byrne, who filed a counter-affidavit, in which he stated :

> "(4) That it is incorrect that no opportunity was given to the petitioner at the time of the oral enquiry to cross-examine the witnesses who had deposed against the petitioner.
>
> (5) That all witnesses were examined in petitioner's presence and he was asked by me at the end of each examination whether he had any questions to put.
>
> (6) That the petitioner only put questions to one witness Shri P. Govinda Nair, and to others he did not."

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1. (1950) S.C.R. 566 ; (1950) S.C.J. 324. 2. (1954) S.C.R. 738, 747 : (1954) S.C.J. 264.

On this affidavit, Mr. Byrne was examined in Court, and he repeated these allegations and added :

"I have distinct recollection that I asked Shri T. R. Varma to put questions in cross-examination to witnesses."

It was elicited in the course of his further examination that he did not make any note that he asked Shri T. R. Varma to put questions in cross-examination to witnesses, and that that might have been due to a slip on his part.

We have thus before us two statements, one by Mr. Byrne and the other by the respondent, and they are in flat contradiction of each other. The question is which of them is to be accepted. When there is a dispute as to what happened before a Court or tribunal, the statement of the Presiding Officer in regard to it is generally taken to be correct, and there is no reason why the statement of Mr. Byrne should not be accepted as true. He was admittedly an officer holding a high position and it is not suggested that there was any motive for him to give false evidence. There are, moreover, features in the record, which clearly show that the statement of Mr. Byrne must be correct. The examination of witnesses began on April 20, 1953, and four witnesses were examined on that date, among them being Sri C. B. Tawakley. If, as stated by the respondent, he asked for permission to cross-examine witnesses, and that was refused, it is surprising that he should not have put the complaint in writing on the subsequent dates on which the enquiry was continued. To one of the witnesses, Sri P. Govindan Nair, he did actually put a question in cross-examination, and it is difficult to reconcile this with his statement that permission had been refused to cross-examine the previous witnesses. A reading of the deposition of the witnesses shows that the Enquiring Officer himself had put searching questions and elicited all relevant facts. It is not suggested that there was any specific matter in respect of which cross-examination could have been but was not directed. We think it likely that the respondent did not cross-examine the witnesses because there was nothing left for him to cross-examine. The learned Judges gave two reasons for accepting the statement of the respondent in preference to that of Mr. Byrne. One is that there was no record made in the depositions of the witnesses that there was no cross-examination. But what follows from this ? That, in fact, there was no cross-examination, which is a fact ; not that the request of the respondent to cross-examine was disallowed. Then again, the learned Judges say that the respondent was present at the hearing of the writ petition before them, that they put questions to him, and formed the opinion that he was sufficiently intelligent, and that it was difficult to believe that he would not have cross-examined the witnesses. We are of opinion that this was a consideration which ought not to have been taken into account in a judicial determination of the question, and that it should have been wholly excluded. On a consideration of the record and of the probabilities, we accept the statement of Mr. Byrne as true, and hold that the respondent was not refused permission to cross-examine the witnesses, and that the charge that the enquiry was defective for this reason cannot be sustained.

The respondent attacked the enquiry on two other grounds, which were stated by him in his petition in the following terms :

"(*C*) That the petitioner was cross-examined and was not enabled to make an oral statement on his own behalf.

(*D*) That the defence witnesses were not given an opportunity to tell their own version or to be examined by the petitioner as their depositions were confined to answers in reply to questions put by the Inquiry Officer."

In substance, the charge is that the respondent and his witnesses should have been allowed to give their evidence by way of examination-in-chief, and that only thereafter, the officer should have cross-examined them, but that he took upon himself to cross-examine them from the very start and had thereby violated well recognised rules of procedure. There is also a complaint that the respondent was not allowed to put questions to them.

Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act ; but that Act has no

application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry, and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law. Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. *Vide* the recent decision of this Court in *New Prakash Transport Co.* v. *New Suvarna Transport Co.*[1], where this question is discussed.

We have examined the record in the light of the above principles, and find that there has been no violation of the principles of natural justice. The witnesses have been examined at great length, and have spoken to all relevant facts bearing on the question, and it is not suggested that there is any other matter, on which they could have spoken. We do not accept the version of the respondent that he was not allowed to put any questions to the witnesses. Indeed, the evidence of Sri Jai Narayan at page 188 of the Paper Book shows that the only question on which the respondent wished this witness to testify was put to him by Mr. Byrne. The evidence of Sri Bhan and Sri Fateh Singh was, it should be noted, wholly in support of the respondent. The findings of Mr. Byrne are based entirely on an appreciation of the oral evidence taken in the presence of the respondent. It should also be mentioned that the respondent did not put forward these grounds of complaint in his explanation dated September 11, 1953, and we are satisfied that they are wholly without substance, and are an afterthought. We accordingly hold, differing from the learned Judges of the Court below, that the enquiry before Mr. Bryne was not defective, that the respondent had full opportunity of placing his evidence before him, and that he did avail himself of the same. In this view, it becomes unnecessary to express any opinion on the second question, which was raised by the learned Solicitor-General.

In the result, we allow the appeal, set aside the order of the Court below, and dismiss the writ application. There will be no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice.*, T. L. VENKATARAMA AIYAR, S. J. IMAM, A. K. SARKAR AND VIVIAN BOSE, JJ.

Hartwell Prescott Singh .. *Appellant**

v.

The Uttar Pradesh Government and Others .. *Respondents.*

Constitution of India (1950), *Article* 311—*Applicability—Employment temporary and on probation—Termination of, as per conditions of services—Reduction from a temporary post, if reduction in rank.*

Where a person was employed in a temporary capacity and on probation and his conditions of service were governed by rules framed (Subordinate Agricultural Service Rules) the termination of his services under Rule 25 (4) thereof does not amount to dismissal or removal from service within the meaning of Article 311 of the Constitution. *Satishchandra Anand* v. *The Union of India*, (1953) S.C.R. 655 : (1953) S.C.J. 323 and *Shyam Lal* v. *The State of Uttar Pradesh*, (1955) 1 S.C.R. 26: (1954) S.C.J. 493 : (1954) 1 M.L.J. 730, relied on.

Reversion from a temporary post held by a person does not *per se* amount to reduction of rank.

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1. (1957) S.C.R. 98 : 1957 S.C.J. 236.

*Civil Appeal No. 100 of 1957. 19th September, 1957.

Appeal by Special Leave from the Judgment and Order dated the 21st October, 1955, of the Allahabad High Court in Civil Misc. Application O.J. No. 120 of 1954.

S. N. Andley, Rameshwar Nath and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co*, for Appellant.

G. C. Mathur and *C. P. Lal*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Imam, J.—This is an appeal by special leave against the decision of the Allahabad High Court dismissing the appellant's application under Article 226 of the Constitution.

From the affidavits filed in the High Court by the Personal Assistant to the Director of Agriculture of the Government of Uttar Pradesh and the appellant, it would appear that the appellant was appointed from time to time in a temporary capacity to the Subordinate Agricultural Service of the Uttar Pradesh Government by the Director of Agriculture. He served in that service during the periods detailed below:

(*a*) *In Group II of the Subordinate Agricultural Service*:

(i) From 16th November, 1936 to 18th March, 1937.

(ii) From 1st April, 1937 to 29th June, 1937.

(iii) From 9th August, 1937 to 31st December, 1937

(iv) From 6th January, 1938 to 22nd February, 1943.

(*b*) *In Group I of the Subordinate Agricultural Service*:

From 23rd February, 1943 to 24th April, 1944.

While he was still in the Subordinate Agricultural Service he was appointed to officiate in the United Provinces Agricultural Service Class II as a Divisional Superintendent of Agriculture with effect from April 25, 1944, with the approval of the Public Service Commission of the United Provinces. He served in Class II of the United Provinces Agricultural Service in a temporary capacity for about ten years when he was reverted to his original appointment in the Subordinate Agricultural Service by an order of the Utter Pradesh Government dated May 3, 1954. The appellant protested against his reversion and handed over charge on May 16, 1954 and went on leave until October 2, 1954. In the meanwhile a notice dated September 13, 1954, terminating the appellant's services in the Subordinate Agricultural Service was issued to him by the Director of Agriculture. The notice purported to be under rule 25, clause (4) of the Subordinate Agriculture Service Rules. This notice stated that the appellant's services would not be required after the expiry of one month from the date of the issue of the order terminating his services. The appellant challenged the validity of the aforesaid orders of reversion and termination of his services. The High Court in dismissing his application came to the conclusion that the appellant had not been dismissed or removed from service and that Article 311 of the Constitution did not apply in the circumstances of the case. The High Court dismissed an application filed by the appellant for the issue of a certificate that the case was a fit one for appeal to this Court.

It was conceded before us on behalf of the appellant that at no time was he confirmed in any post either in the Subordinate Agricultural Service or in the United Provinces Agricultural Service Class II. In our opinion, the finding of the High Court that the appellant had failed to establish that he was confirmed as a member of the Subordinate Agricultural Service, based upon the materials before it, was a correct finding. The further finding of the High Court that the appellant's contention that he had been absorbed in the permanent cadre of the United Provinces Agricultural Service had not been substantiated appears to us also to be a correct finding upon the materials on the record.

In considering the case of the appellant we must proceed on the basis that at no time was the appellant appointed permanently either to the United Pro-

vinces Agricultural Service or to the Subordinate Agricultural Service. At all times he was temporarily employed. Mr. Andley's contention on behalf of the appellant had been that Article 311 of the Constitution applied even to a temporary appointment because the appellant held a civil post under the Government of the State of Uttar Pradesh although he may not have been a member of a Civil Service of that State. The order terminating his services amounted to dismissal or removal from the post as it conveyed an imputation of inefficiency and unsatisfactory work and the order reverting him from the post held by him in the United Provinces Agricultural Service to his original appointment in the Subordinate Agricultural Service amounted to a reduction in his rank, as it was by way of penalty. The mandatory provisions of Article 311 not having been complied with the aforesaid orders passed against the appellant were illegal. The question for consideration, therefore, is whether the orders terminating the appellants' services and reverting him to his original appointment in the Subordinate Agricultural Service amount to removal, dismissal or reduction in rank within the meaning of the provisions of Article 311 of the Constitution.

The decisions of this Court in *Satish Chandra Anand* v. *The Union of India*[1], and in *Shyam Lal* v. *The State of Uttar Pradesh*[2], clearly establish that termination of the services of a person employed by the Government does not amount in all cases to dismissal or removal from service. In the former case the termination was in accordance with the terms of the contract and in the latter case it was by way of compulsory retirement of a member of a service under Article 465-A of the Civil Service Regulations. This Court held that in neither case the termination of the services of the person concerned amounted to dismissal or removal from service within the meaning of Article 311 of the Constitution. In the present case the appellant was employed in a temporary capacity in the Subordinate Agricultural Service and was shown in the Gradation List as on probation. His conditions of service were governed by the Subordinate Agriculture Service Rules. Rule 25 (4) of these Rules permits the Director of Agriculture to terminate the services of a person on probation by giving him one month's notice if that person has not made sufficient use of his opportunities or if he has otherwise failed to give satisfaction. The termination of the appellant's services under rule 25 (4) does not amount to dismissal or removal from service within the meaning of Article 311 as it was in accordance with the terms of the conditions of service applicable to the appellant. In principle, we cannot see any clear distinction between the termination of the services of a person under the terms of a contract governing him and the termination of his services in accordance with the terms of his conditions of service. The order complained against did not contravene the provisions of Article 311 and was therefore a valid order.

Reversion from a temporary post held by a person does not *per se* amount to reduction in rank because the temporary post held by him is not his substantive rank. For the purposes of this appeal it is unnecessary to decide in what circumstances a reversion would be regarded as reduction in rank as the appellant has not established as a fact that the order of reversion passed against him was by way of a penalty. The order of reversion, therefore, did not contravene the provisions of Article 311 and was a valid order.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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1. (1953) S.C.R. 655 : (1953) S.C.J. 323.
2. (1955) 1 S.C.R. 26 : (1954) S.C.J. 493 : (1954) 1 M.L.J. 730.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. GOVINDA MENON AND J. L. KAPUR, JJ.

Surinder Kumar and others .. *Appellants**

v.

Gian Chand and others .. *Respondents.*

Supreme Court Rules, Order 45, *rule* 5—*Inherent powers—Additional evidence—Probate obtained after judgment under appeal—Effect on objection as to want of proper attestation*—(*Succession Act*, (*XXXIX of* 1925), *section* 63 (1) (*c*).

Though there is no specific provision for admission of additional evidence in appeal, rule 5 of Order 45 of the Supreme Court Rules recognises the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of Courts. There is no restriction on its powers to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out: Vide *Indrajit Pratap Singh* v. *Amar Singh*, (1923) 45 M.L.J. 578 : L.R. 50 I.A. 183 (191).

Moreover in deciding the appeal the Court has to take the circumstances as they are at the time of deciding it and the grant of probate (judgment *in rem*) which has supervened since the decision under appeal was given and placed before the Court must be taken into consideration in deciding the appeal. *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri*, (1940) F.C.R. 84, (1941) 1 M.L.J. (Supp.) 49: (1939-40) F.L.J. 73 (F.C.), referred.

In that even the infirmity due to the want of proper attestation of the *will* under section 63 (1) (*c*) of Succession Act would be removed.

Appeal by Special Leave from the Judgment and Order, dated the 16th August, 1949, of the Punjab High Court in Regular First Appeal No. 57 of 1949 arising out of the Judgment and Order, dated the 30th November, 1945, of the Court of Senior Sub-Judge, Gurdaspur, in Suit No. 298 of 1944.

H. J. Umrigar and *K. L. Mehta*, Advocates, for Appellants.

R. S. Narula, Advocate, for Respondents (except Respondent No. 2).

The Judgment of the Court was delivered by

Kapur, J.—This appeal by Special Leave is brought from the Judgment and Decree of the High Court of the Punjab, dated August 16, 1949, reversing the decree of the trial Court which had decreed the plaintiffs' suit on a mortgage.

The plaintiffs who are the appellants in this appeal claim to be the legatees under a registered will of their mother's father Lala Guranditta Mal executed on September 6, 1944. One of the items bequeathed to them was the rights in a mortgage executed by the defendants in favour of the testator on October 24, 1932, for Rs. 6,000. On October 25, 1944, they brought a suit in the Court of the Senior Subordinate Judge, Gurdaspur, for the recovery of Rs. 5, 392-2-0 on the basis of the mortgage. They alleged that they were the " representatives and heirs " of Lala Guranditta Mal under the will and in their replication they just stated:

" We are heirs and representatives of Lala Guranditta Mal mortgagee deceased ".

Inter alia the defendants pleaded that they had no knowledge of the will alleged to have been made by Guranditta Mal and they denied that plaintiffs were heirs and representatives of the mortgagee and therefore had no *locus standi* to sue. Five issues were stated by the learned trial Judge out of which the issue now relevant for the purpose of this appeal is the first one :

(1) Have the plaintiffs a *locus standi* to maintain the present suit as successors-in-interest of Guranditta deceased ?

The learned Subordinate Judge held that the will " had the presumption of its correct execution " because it was registered and also that not obtaining the probate of the will was no bar to the plaintiffs obtaining a decree and passed a preliminary mortgage decree. On the matter being taken in appeal to the High Court the decree of the trial Court was reversed and the suit of the plaintiffs dismissed but the parties were left to bear their own costs. The High Court held :

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* C.A. No. 49 of 1954. 24th September, 1957.

"It is thus clear that attestation by two witnesses was necessary in order to validate the will now before us. As this requirement of law has not been satisfied the plaintiffs had no *locus standi* to maintain the suit".

A prayer made for the admission of additional evidence under Order 41, rule 27 of the Civil Procedure Code was rejected. The High Court refused leave to appeal under Article 133 but Special Leave was granted on October 21, 1952. In the meanwhile the probate of the will of Lala Guranditta Mal was granted by the District Judge of Gurdaspur on July 11, 1951, in favour of the present appellants and their mother Mussammat Har Devi. The appellants made an application in this Court for the admission of additional evidence and prayed that the "probate be placed on the record" as the "probate of the will operated as a judgment *in rem*". They also applied to add Mussammat Har Devi as a respondent in the appeal.

An objection to the admission of additional evidence at this stage is taken by the respondents on the ground that the probate was obtained without their knowledge and that the application was made at a late stage, it deprived the respondents of the valuable right which vests in them because the claim has become statute barred and that there is no provision in the Rules of this Court for the admission of additional evidence. It is clear that the probate was applied for and obtained after the judgment of the High Court and therefore could not have been produced in that Court. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem*. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself.

As to the power of this Court, there is no specific provision for the admission of additional evidence, but rule 5 of Order 45 of the Supreme Court Rules recognises the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of process of the Court. The Privy Council in *Indrajit Pratap Sahi* v. *Amar Singh*[1], said :

"that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out."

The powers of this Court in regard to the admission of additional evidence are in no way less than that of the Privy Council. Moreover in deciding the appeal we have to take the circumstances as they are at the time when the appeal is being decided and a judgment *in rem* having been passed in favour of the appellants it is necessary to take that additional fact into consideration. It was so held by the Federal Court in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri*[2], where Gwyer, C.J., quoted with approval the following observation of Chief Justice Hughes in *Patterson* v. *State of Alabama*[3] :

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Varadachari, J., was of the opinion that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing and therefore in moulding the relief to be granted in appeal an appellate Court is entitled to take into account even facts and events which have come into existence since the decree appealed from was passed. He referred to many Indian cases and to the practice of the Judicial Committee of the Privy Council and to some English cases.

In our opinion the fact of the grant of the probate which has supervened since the decision under appeal was given and which has been placed before this Court must be taken into consideration in deciding the appeal. In that event the infirmity in the appellant's case due to the want of proper attestation of the will under section 63 (1) (*c*) of the Indian Succession Act would be removed. Because of

1. (1923) 45 M.L.J. 578 : L.R. 50 I.A. 183 at 191.
2. (1941) 1 M.L.J. (Supp.) 49; (1939-40) F.L.J. 73 (F.C.) : (1940) F.C.R. 84.
3. (1934) 294 U.S. 600 at 607.

the view we have taken the other objection raised by the respondents becomes wholly inefficacious. The finding of the High Court on this point is therefore reversed.

We therefore, allow this appeal, set aside the judgment and decree of the Punjab High Court and remit the case to the High Court for decision of the other issues which had not been decided.

As the appellants did not obtain the probate till after the appeal was filed in this Court and made the application for the admission of additional evidence at such a late stage, they will pay Rs. 500 as costs of this Court to the respondents within two months. In default of such payment the appeal shall stand dismissed with costs, *i.e.*, Rs. 500.

Appeal allowed: Case remitted.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—N. H. BHAGWATI, T. L. VENKATARAMA AIYAR AND J. L. KAPUR, JJ.

The Commissioner of Income-tax .. *Appellant**

v.

Smt. Jyotikana Chowdhurani and others .. *Respondents.*

S. M. Lahiri, Advocate-General, Assam .. *Intervener.*

Income-tax Act (XI of 1922), sections 2 (1) and 4 (3) (viii)—Income from sale of trees—Forest of spontaneous growth—Forestry operations by the assessee—If 'agricultural operations'—Income if 'agricultural income' exempt under section 4 (3) (viii).

Where, on a reference under section 66 of the Income-tax Act (XI of 1922) the High Court held that even though there was no tilling of the land or planting of seeds or saplings and the trees were of spontaneous germination, the forestry operations carried out by the assessee were conducive to the growth and development of the trees and in essence involved the expenditure of human skill and labour on the land itself and in its opinion those operations were "agricultural operations" and the land on which the trees stood was being used for "agricultural purposes" and therefore the income from the sale of the trees was "agricultural income" exempt from taxation under section 4 (3) (viii) of the Act and the Court accordingly answered the referred question in the affirmative the Supreme Court on appeal,

Held :—The connotations of the terms 'agriculture' 'agricultural purpose' and the conditions under which the forestry operations performed by the assessee on forests of spontaneous growth can be assimilated to agricultural operations so as to constitute the income derived from the sale of the forest trees have been laid down in *The Commissioner of Income-tax, West Bengal* v. *Rajah Benoy Kumar Sahas Roy*, (1957) S.C.J. 740 : (1957) 2 M.L.J. (S.C.) 145 : (1957) 2 An. W.R. (S.C.) 145. Applying the principles therein to the instant case, where there was no planting or sowing of the seeds, nor was any human agency employed for tilling the soil and no basic operations either was performed on the forest lands, the forests continued to be forests of spontaneous growth ; though the forestry operations, relied on had the effect of increasing the produce, the forests nonetheless remained forests of spontaneous growth. Unless and until there was one basic operation on the land itself to which the operations could be assimilated they could not be tacked on so as to convert the whole of them to 'agricultural operations ; the ratio adopted by the majority of the Judges of the High Court was erroneous and the question referred has to be answered in the negative (*i.e.*) the income from the sale of trees in the case is not "agricultural income" exempt under section 4 (3) (viii) of the Act.

Appeals from the Judgment and Order, dated the 10th August, 1953, of the Assam High Court in Income-tax Reference No. 7 of 1951.

G. N. Joshi and *R. H. Dhebar*, Advocates, for Appellant.

S. C. Isaacs, Senior Advocate, *R. R. Biswas*, (Advocate with him) for Respondent.

S. M. Lahiri, Advocate-General, Assam, in person (*Naunit Lal*, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Bhagwati, J.—These six appeals with certificates of fitness under section 66-A (2) of the Indian Income Tax Act (XI of 1922) are directed against a common

1. A.I.R. 1954 S.C. 680.

* Civil Appeals Nos. 57 to 62 of 1956. 23rd May, 1956.

judgment and order passed by the Full Bench of the High Court of Judicature in Assam delivered on a consolidated Reference by the Income Tax Appellate Tribunal under section 66(1) of the Act whereby Sarjoo Prasad, C.J., and Ram Labhaya, J., answered the referred question in the affirmative and Deka, J., answered it in the negative.

The referred question was :

"Whether on the facts and in the circumstances of this case the receipts from the sale of sal trees can be said to be agricultural income under section 2 (1) and exempt from taxation under section 4 (3) (*viii*) of the Income-tax Act".

These appeals were consolidated and the High Court ordered that a consolidated amount of security of Rs. 4,000 together with one set of printing costs be deposited by the appellant, the Commissioner of Income-tax, Assam.

The appellant filed one statement of case but the respondents in the six appeals filed separate statements of case each one of them.

Smt. Jyotikana Chowdhurani, the respondent in Civil Appeal No. 57 of 1956, is the widow and legal representative of the late Jyotsna Nath Chowdhury who was a co-sharer and proprietor of the Mechpara Estate situate in the District of Goalpara in the State of Assam. The said estate is assessed to land revenue payable to the State of Assam and is also subject to local rates assessed and collected by the officers of the Assam Government. The said estate has vast areas of forest tracts, considerable portions of which are covered mainly by Sal trees. The trees in the forests are of spontaneous growth and there was no planting or sowing or employment of any human agency for the purpose of tilling the soil.

The late Rai Sourindra Narayan Sinha Chowdhury father of Shri Jyotirindra Narayan Sinha Chowdhury was a co-sharer of "Parbat-Joar Estate" and had been assessed by the Income Tax Officer in the year 1923 on receipts from the sale of Sal trees from his forests as income within the meaning of the Indian Income Tax Act. The Assistant Commissioner of Income Tax on appeal held by his order dated April 28, 1923, that receipts from forests were agricultural income and the Income Tax Authorities accepted the said decision and ceased to assess such receipts for a good number of years.

On December, 17, 1946, the said Jyotsna Nath Chowdhury was assessed for the year 1946-1947 to income-tax on his receipts from the sale of Sal trees from his forests by the Income Tax Officer, Gauhati. An appeal filed by him against the said order of assessment failed and so did a further appeal filed by him to the Income Tax Appellate Tribunal, Calcutta. He thereupon asked for a reference by the Income Tax Appellate Tribunal of certain questions of law arising out of its order under section 66 (1) of the Indian Income Tax Act. The Tribunal drew up a common statement of case in regard to the assessments of the said Jyotsna Nath Chowdhury as also the other respondents in the appeals before us and referred the question set out above to the High Court for its opinion. The said reference was heard by a Special Bench of the Assam High Court with the result indicated above.

Birendra Narayana Chowdhury, the respondent in Civil Appeal No. 58 of 1956 was a co-sharer proprietor of the same estate. He also was assessed on December 17, 1946, to income-tax on his receipts from the sale of sal trees from his forests for the year 1946-47 by the Income Tax Officer, Gauhati. The appeals filed by him before the Appellate Assistant Commissioner of Income Tax, Calcutta "B" Range and the Income Tax Appellate Tribunal were also dismissed. The latter however referred the same question to the High Court under section 66 (1) of the Indian Income Tax Act, at his instance.

Shrimati Sulochana Chowdhury, the respondent in Civil Appeal No. 59 of 1956 is the legal representative of the late Jagadindra Narayan Chowdhury who was a co-sharer proprietor of the Parbat-Joar and Mechpara estates within the district of Goalpara in Assam. On March 24, 1947, the said Jagadindra Narayan Chowdhury was assessed to income-tax on his receipts from the sale of Sal trees from his forests for the year 1946-47 by the Income Tax Officer, Gauhati. He preferred

an appeal before the Appellate Assistant Commissioner of Income Tax, Calcutta, "B" Range but died during the pendency of the said appeal and was succeeded by his mother—the respondent. The Appellate Income Tax Commissioner, Calcutta, "B" Range by his order, dated March 15, 1948, reduced the assessment. The respondent preferred an appeal against the said order of the Appellate Tribunal. which dismissed the appeal. The same question was referred by the Income Tax Appellate Tribunal to the High Court for its opinion under section 66 (1) of the Indian Income Tax Act at the instance of the respondent.

Kamal Krishna Chowdhury, the respondent in Civil Appeal No. 60 of 1955 was a co-sharer proprietor of the Mechpara estate within the district of Goalpara in Assam and he was also assessed to income-tax on his receipts from the sale of sal trees from his forests for the year 1946-47 by an Order of the Income Tax Officer, Gauhati, dated December 17, 1946. He also filed unsuccessful appeals before the Appellate Assistant Commissioner of Income Tax, Calcutta "B" Range and to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal at his instance referred the very same question to the High Court for its opinion under section 66 (1) of the Indian Income Tax Act.

Sourindra Narayan Chowdhury, the respondent in Civil Appeal No. 61 of 1956, a co-sharer proprietor of the Parbat-joar and Mechpara Estates within the district of Goalpara in Assam, was also assessed to income-tax for the receipts from the sale of Sal trees from his forests for the year 1946-47 by the Income Tax Officer, Gauhati, on July 29, 1947. He was similarly assessed by the same officer for the receipts from the sale of Sal trees from his forests for the year 1946-47 by the order of the Income Tax Officer, Gauhati, dated December 17, 1947, and was also assessed to income-tax on similar receipts for the year 1948-49 by the same officer on November 30, 1948. He took appeals against these orders of the Income Tax Officer, Gauhati, to the Appellate Assistant Commissioner of Income Tax, Calcutta "B" Range, and thereafter to the Income Tax Appellate Tribunal, Calcutta, all of which were unsuccessful. The very same question was referred by the Income Tax Appellate Tribunal, Calcutta, under section 66 (1) of the Indian Income Tax Act for opinion to the High Court at his instance.

(1) Smt. Sindhurani Chaudhurani, (2) Soumaya Narayan Sinha Chowdhury, (3) Anal Narayan Chowdhury, the respondents in Civil Appeal No. 62 of 1956, are the widow and the minor sons and legal representatives of the late Jyotirindra Narayan Sinha Chowdhury who was a co-sharer proprietor of the Parbat-Joar and Mechpara estates within the district of Goalpara in Assam. On December 17, 1946, December 17, 1947 and November 22, 1948, he was assessed by the Income Tax Officer, Gauhati, to income-tax on his receipts from the sale of Sal trees from his forests for the years 1946-47, 1947-48 and 1948-49, respectively. He preferred appeals to the Appellate Assistant Commissioner of Income Tax, Calcutta, "B" Range and to the Income Tax Appellate Tribunal, Calcutta, without success and the Income Tax Appellate Tribunal referred the very question for opinion to the High Court under section 66 (1) of the Indian Income Tax Act, at his instance.

All these references were heard together by a Special Bench of the High Court and three separate judgments were delivered by the High Court, Sarjoo Prasad, C.J. and Ram Labhaya, J., being of the same opinion, Deka, J., dissenting.

The facts appearing from the consolidated statement of case submitted by the Income Tax Appellate Tribunal, Calcutta, to the High Court were these:

"It was admitted that the trees in the forest were of spontaneous growth (which is now stated by the representatives of the assessees that it meant of spontaneous germination) there was no planting or sowing nor were any human agency employed for the purpose of tilling the soil. From all that was done to the trees it was clear that the trees sold were those standing for a considerable number of years during which the soil had remained untouched. In the production of the income the applicants made no contribution by way of cultivation.

The Applicants' case, however, was that there had been employment of human skill and labour with respect to the forests. Apart from the fact of the maintenance of a forest establishment, it was claimed that human skill and labour were employed for the maintenance, preservation, nursing, improving and rearing of the forests, so that the quality and general condition of the forest might be

improved. It is claimed by the Applicants in their petition which was filed before the Tribunal on 22nd June, 1951, in reply to the Draft Statement of Case that the following activities with reference to the forest were taken recourse to :

(*a*) Reservation of blocks of forest commonly known as Jhars and their operation in these blocks by rotation (cyclic order) ;

(*b*) Marking of trees fit for felling ;

(*c*) Creeper and climber cutting :

(*d*) Thinning and removal of deceased and unsound trees ;

(*e*) Clearing of jungles and under-growth ;

(*f*) Allowing grazing from Kartik to Chaitra ;

(*g*) Burning of under-growths in March/April (which clears the jungles and fertilises the soil) ;

(*h*) Protection from fire—Maintenance of fire lines ;

(*i*) Closure of all forests to men and cattle during rainy season Baisak to Aswin ; and

(*j*) Preservation of mother trees.

In order to establish these facts an affidavit was filed before the Tribunal at the time of hearing of the Appeal. But the actual costs with reference to each activity could not be found from the books of the Assessee. . . . . It is not disputed that no sum was contributed towards cultivation."

Even though Sarjoo Prasad, C.J., and Ram Labhaya, J., proceeded on the basis that these facts were proved, Deka, J., struck a dissenting note and observed that there was no evidence as to the claim made by the respondents and that the statements made on affidavit could not be accepted as there was no means to test them. We shall, however, proceed on the basis that these facts were proved by the assessees and determine whether the operations which the assessees claim to have performed in these forests were agricultural operations such as to bring the income derived from these forests within the definition of agricultural income.

It may be noted that on the question of the employment of human skill and labour, the appellants' representative stated before the Tribunal that with regard to the Mechpara estate, the expenses on forest establishment (including temporary hands) were estimated at Rs. 15,000 a year, the gross receipts being about Rs. 1,70,000. With regard to Parbat-Joar estate, whose gross receipts come to Rs. 3,32,414, the appellants'-representative stated that a total sum of Rs. 14,057 had been spent on the following heads :

8 Forest Officers and 18 Barkandajas	.. Rs. 5,219
32 Forest Guards	.. Rs. 4,838
Proportionate salary of the Head Officers	.. Rs. 4,000
	Total Rs. 14,057

On these facts the majority of the Judges held that even though there was no tilling of the land or planting of seeds or saplings and the trees were of spontaneous germination, the operations carried on by the assessees were conducive to the growth and development of the trees and in essence involved the expenditure of human skill and labour on the land itself. In the opinion of the Court those operations were "agricultural operations" and the land on which the trees stood was being used for "agricultural purposes" and therefore, the income from the sale of the trees was "agricultral income" and was exempt from taxation under section 4 (3) (*viii*) of the Income Tax Act and the Court accordingly answered the referred question in the affirmative.

The appellant applied for and obtained certificates of fitness under section 66-A (2) of the Act and that is how these appeals have come up for hearing and final disposal before us.

The connotation of the terms "agriculture" and "agricultural purpose" and the conditions under which the forestry operations performed by the assessee on forests of spontaneous growth can be assimilated to agricultural operations so as to constitute the income derived from the sale of the forest trees agricultural

income within the meaning of its definition in section 2 (1) of the Indian Income Tax Act have been laid down by us in the judgment just delivered in *The Commissioner of Income-tax, West Bengal* v. *Raja Benoy Kumar Sahas Roy* (Civil Appeal No. 165 of 1954)[1].

Applying the principles which we have enunciated in that judgment to the facts of the instant cases, it appears that there was no planting or sowing of the seeds nor was any human agency employed for the purpose of tilling the soil. The soil had remained untouched and in the production of the income the assessees had made no contribution by way of cultivation. There were no basic operations either which were performed by the assessees on the forest lands. What was done by them was the performance of forestry operations which were in the nature of subsequent operations, operations which were performed after the produce had sprouted from the soil. The forests continued to be forests of spontaneous growth and the only result of the performance of these operations on the produce of the forests which was the outcome of spontaneous growth unaided by human skill and labour was the maintenance, preservation, nursing, improving and rearing of the forests. Even though these subsequent operations had the effect of increasing the produce of the forests, the forests nonetheless remained forests of spontaneous growth. No human skill and labour was spent by the assessees on the cultivation of the forest land nor was any human skill and labour performed on the land itself. The various operations which were described in the statements of the case were no doubt for fostering the growth of the forests and obtain the greatest advantage from the forest trees, but they nevertheless were of spontaneous growth. Nothing was done by the assessees to grow the trees from the soil itself. They had grown there by the process of nature. The obstacles which would retard the growth of these trees which had grown spontaneously from the soil were certainly removed but these operations would not convert these subsequent operations into basic operations which would be the only pre-requisites for the cultivation of the forest land. Out of the categories (*a*) to (*g*) set out in the statement of facts, none of the operations was assimilated to basic operations in agriculture and unless and until there was even one basic operation on the land itself the rest of the operations could not be tacked on to them so as to convert the whole of them into agricultural operations. We are of opinion that the ratio adopted by the majority of the Judges of the High Court was erroneous and the referred question ought to have been answered in the negative.

We are fortified in this conclusion if regard be had to the fact that the forestry operations which were performed by the assessees were of insignificant value as compared with the gross receipts derived by them from the sale of the forest trees. In the case of Mechpara estate the costs of these operations did not even come to 8 per cent. and in the case of the Parbat-Joar estate even to 4 per cent. of the gross income. All these operations were mainly operations performed for facilitating the spontaneous growth of these trees from the forest land and could not by any stretch of imagination be assimilated to agricultural operations.

We are therefore of opinion that the decision reached by the majority of the Judges of the High Court was not correct and it ought to be set aside. The appeals will therefore be allowed and the referred question will be answered in the negative. The appellant will get from the respondents one set of costs in all the appeals in this Court and Rs. 250 being the consolidated hearing fee of the Income Tax References in the High Court.

Appeals allowed. Reference answered in the negative.

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1. Since reported in (1957) S.C.J. 740: (1957) 2 M.L.J. (S.C.) 145: (1957) 2 An.W.R. 145 (S.C.).

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, S. K. DAS AND P. B. GAJENDRAGADKAR, JJ.

Council of the Institute of Chartered Accountants and another .. *Appellants**

v.

B. Mukherjea .. *Respondent.*

Chartered Accountants Act (*XXXVIII of* 1949), *sections* 2 (2) (*iv*) *and Regulation* 78 *of the Regulations framed by Central Government—Member of Institute of Chartered Accountants appointed as Liquidator of certain companies—If deemed* " *to be in practice* "*—Misconduct by—Disciplinary jurisdiction under sections* 21 *and* 22 *of the Act.*

The provisions of Regulation 78 of the Regulations framed by the Central Government under section 30 (4) of the Chartered Accountants Act must inevitably be considered in the light of section (2) (2) (iv) of the Act and the result of considering the two provisions together obviously is that when a member of the Institute of Chartered Accountants was working as a liquidator in pursuance of an order of Court he must be deemed " to be in practice " within the meaning of section 2 (2) (IV).

The object with which clause (iv) in sub-section (2) of section 2 of the Chartered Accountants Act has been deliberately introduced by the Legislature, appears to be to bring within the disciplinary jurisdiction of the statutory bodies recognized under the Act, conduct of Chartered Accountants even while they are rendering service otherwise than as Chartered Accountants properly so-called, *e.g.*, as Liquidator of a company appointed by a Court. It is because the Legislature wanted to provide a self-contained code of conduct in respect of Chartered Accountants that the denotation of the expression " to be in practice " has been in a sense deliberately and artificially extended by virtue of section 2 (2) (iv).

Though the definition used in section 2 (1) refers to the acts and omissions specified in the Schedule, the list of the said acts and omissions is not exhaustive ; and, in any event, the said list does not purport to limit the power conferred on the Council under sub-section (1) of section 21 which may otherwise flow from the words used in the said sub-section itself.

Accordingly if a member of the Institute is *prima facie* guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provisions of the Schedule it would still be open to the Council to hold an inquiry against the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court under section 21 (3). The powers of the High Court under section 21 (3) are wide enough to enable the High Court to adopt any course which in its opinion will enable the High Court to do complete justice between the parties.

Appeal by Special Leave from the Judgment and Order, dated the 12th January, 1955, of the Calcutta High Court, in exercise of its Special Jurisdiction under the Chartered Accountants Act, 1949, in Matter No. 107 of 1954.

M. C. Setalvad, Attorney-General for India (*S. N. Andley, J. B. Dadachanji* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellants.

Aswini Kumar Ghose, T. S. Venkataraman and *K. R. Chaudhury*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The material facts leading to the present appeal are not in dispute and may be conveniently stated at the outset. On July 17, 1935, the respondent was enrolled as a registered accountant under the Auditors Certificate Rules, 1932. When the Chartered Accountants Act, 1949, came into operation, the respondent's name was entered as a Member of the Institute of Chartered Accountants of India on July 1, 1949. On September 13, 1950, the respondent was appointed a Liquidator of three companies. The respondent obtained refund of the sums and securities deposited on behalf of the three companies with the Reserve Bank of India. He, however, made no report about the progress of liquidation of the said three companies. Repeated requests made to him by the Assistant Controller of Insurance found no response. As Liquidator the respondent gave a cheque to Shri S. K. Mandal, Solicitor to the Central Government at Calcutta towards payment of the taxed costs in the winding-up proceedings of one of the companies. The said cheque was, however, returned dishonoured on the ground that the payment had

* Civil Appeal No. 170 of 1956. 10th September, 1957.

not been arranged for. When the Assistant Controller of Insurance found that the conduct of the respondent as Liquidator was wholly unsatisfactory and that he would not even show the ordinary courtesy of replying to the letters addressed to him, he proceeded to cancel the appointment of the respondent as Liquidator by his letter, dated October 29, 1952. The respondent was then called upon to hand over all books of account, records, documents, etc., to Shri N. N. Das, who was appointed a Liquidator in his place. Shri Das as well as the Assistant Controller of Insurance then made repeated demands on the respondent to deliver to Shri Das the assets and records of the three companies. It is common ground that the respondent had with him securities of the value of Rs. 11,950 and a cash sum of Rs. 642 on account of the United Common Provident Insurance Co., Ltd. He had also with him securities to the value of Rs. 12,100 on account of the Asiatic Provident Co., Ltd., and securities and cash on account of the Citizens of India Provident Insurance Co., Ltd. Out of these amounts the respondent returned only securities of the face value of Rs. 10,000 and Rs. 350 of Asiatic Provident Co., Ltd., and United Common Provident Insurance Co., Ltd., respectively. He failed to send any further securities or cash held by him on account of the said three companies. It was at this stage that a complaint was lodged against the respondent with the Council of the Institute of Chartered Accountants of India in Calcutta. As required by the provisions of the Act, the disciplinary committee of the Council inquired into the matter. Notice was served on the respondent but he filed no written statement within the time fixed. On August 1, 1953, a letter was received from the respondent that he was ill and was unable to attend personally. The respondent had also requested for the adjournment of the case. Proceedings were accordingly adjourned to August 29, 1953, on which date the respondent was represented by a counsel who filed the respondent's affidavit stating that he was prepared to hand over the entire cash, books of account, etc., to the newly appointed Liquidator without rendering necessary accounts. It appears that Shri Das, the subsequently appointed Liquidator, gave evidence before the disciplinary committee. Though several opportunities were given to the respondent to appear before the disciplinary committee he failed to appear or to take part in the proceedings. Ultimately the committee made its report on September 13, 1953, and found that the respondent was guilty of gross negligence in the conduct of his professional duty in not handing over charge of the assets and the books of account of the said companies to the newly appointed Liquidator. This report was considered by the Council itself as required by the Act. The Council agreed with the finding recorded by the disciplinary committee in substance, but took the view that the acts and omissions of the respondent were more serious than what can be described as gross negligence. The finding of the Council was then forwarded to the High Court of Judicature at Calcutta as required by section 21 (1) of the Act and the matter was heard by the learned Chief Justice and Mr. Justice Lahiri. By their judgment, delivered on January 12, 1955, the reference was rejected on the ground that no action could be taken against the respondent under the Act though the facts proved against the respondent showed that "he had been guilty of grossly improper conduct if not dishonesty". On these facts the main point which arises for our decision is what is the nature, scope and extent of the disciplinary jurisdiction which can be exercised under the provisions of this Act against the respondent.

It would now be necessary to examine the scheme of the material provisions of the Act. This Act came into force in 1949 and it was passed, because the Legislature thought it expedient to make provision for the regulation of professional accountants and for that purpose it has provided for the establishment of the Institute of Chartered Accountants. Section 2, sub-section (1) (*b*) defines a Chartered Accountant as meaning "a person who is a member of the Institute and who is in practice". Section 2, sub-section (2) provides that a member of the Institute shall be deemed to be in practice when, individually or in partnership with chartered accountants, he, in consideration of the remuneration received or to be received does any of the acts mentioned in the following 4 sub-clauses. Sub-clause (iv) is relevant for our purpose:

"*Section* 2 (2) (iv) : " (Where a member) renders such other services as in the opinion of the Council are or may be rendered by a chartered accountant, (he is deemed to be in practice) ".

Section 4 provides for the entry of names in the register of chartered accountants. Section 5 divides the members of the Institute into two classes designated respectively as Associates and Fellows. Section 6 lays down that no member of the Institute shall be entitled to practise unless he has obtained from the Council a certificate of practice. Under section 7, every member of the Institute in practice shall be designated as a chartered accountant and no person practising the profession of accountancy in India shall use any other designation whether in addition thereto or in substitution therefor. Section 8 deals with disabilities. Any person who incurs any one of the disabilities enumerated in sub-clauses (i) to (vi) of section 8 shall not be entitled to have his name entered in or borne on the Register. Sub-clause (v) deals with the disability arising by reason of conviction by a competent Court whether within or without India of an offence involving moral turpitude and punishable with transportation or imprisonment or of an offence not of a technical nature committed by him in his professional capacity unless in respect of the offence committed he has either been granted a pardon or on an application made by him in this behalf, the Central Government has, by an order in writing removed the disability. Sub-clause (vi) deals with the disability in cases where the chartered accountant is found on an inquiry to be guilty of conduct which renders him unfit to be a member of the Institute. Chapter III deals with the constitution of the Council, the committees of the Council and the finances of the Council. Chapter IV deals with the register of members and the removal from the Register of the name of a chartered accountants as provided by section 20, sub-clauses (*a*), (*b*) and (*c*). Under section 20, sub-section (2), it is provided that the Council shall remove from the Register the name of any member who has been found by the High Court to have been guilty of conduct which renders him unfit to be a member of the Institute. Chapter V deals with the question of misconduct. It consists of sections 21 and 22. Chapter VI deals with the constitution and functions of the Regional Councils; Chapter VII deal, with penalties and Chapter VIII deals with miscellaneous matters. Section 21 deals with the procedure of enquiries relating to misconduct of members of the Institute. It reads thus :

"*Section* 21. (1). Where on receipt of information or on receipt of a complaint made to it, the Council is of opinion that any member of the Institute has been guilty of conduct which, if proved, will render him unfit to be a member of the Institute, or where a complaint against a member of the Institute has been made by or on behalf of the Central Government, the Council shall cause an inquiry to be held in such manner as may be prescribed, and the finding of the Council shall be forwarded to the High Court.

(2)......................

(3)......................

(4)......................"

Sub-sections (2), (3) and (4) of section 21 deal with the powers of the High Court in dealing with the reference made to it, under section 21, sub-section (1). Section 22 defines misconduct. It reads thus :

"*Section* 22. For the purposes of this Act, the expression " conduct which, if proved, will render a person unfit to be a member of the Institute " shall be deemed to include any act or omission specified in the Schedule, but nothing in this section shall be construed to limit or abridge in anyway the power conferred on the Council under sub-section (1) of section 21 to inquire into the conduct of any member of the Institute under any other circumstances."

The learned Judges of the Calcutta High Court have held that the conduct of which the respondent is proved to have been guilty cannot be said to be professional misconduct properly so-called and cannot, therefore, attract the provisions of sections 21 and 22 of the Act. " There, thus, seems to be no room for contending," observes the learned Chief Justice in his judgment " that misconduct not connected with the exercise of the profession is also within ths ambit of the Act, provided it involves moral turpitude or appears to render a person unworthy to remain a member of a responsible profession." It has also been found by the learned Judges that even if they were to hold that the misconduct proved against the respondent attracted the

provisions of sections 21 and 22 of the Act it would not be open to them to take any action against the respondent on that ground because the Institute cannot expect the Court to take action in the present case on the footing that the respondent had been guilty of misconduct otherwise than in his professional capacity since that is not the finding which the Council arrived at and which is reported to the Court. It is the correctness of these findings that is challenged before us by the learned Attorney-General. He contends that the learned Judges of the Calcutta High Court have put an unduly restricted and narrow construction on the provisions of section 21 and section 22 in holding that the respondent's conduct does not amount to professional misconduct; and he has also urged that the technical reason given by the learned Judges in not taking any action against the respondent even if they had accepted the broader interpretation of the two said sections proceeds on a misconception about the nature and extent of the powers of the High Court while hearing references made to it under the provisions of section 21, sub-sections (2), (3) and (4). In our opinion, the contentions raised by the learned Attorney-General are well-founded and must be upheld.

Let us first consider whether the conduct of the respondent amounts to professional misconduct or not. In dealing with this question it is necessary to bear in mind the provisions of section 2, sub-section (2) (iv) of the Act. A member of the Institute under this provision shall be deemed to be in practice when he renders such other services as in the opinion of the Council are or may be rendered by a chartered accountant. In other words, just as a member of the Institute who engages himself in the practice of accountancy is by such conduct deemed to be in practice as a chartered accountant, so is he deemed to be in practice as a chartered accountant when he renders other services mentioned in section 2, sub-section (2) (iv). What other services attract the provisions of this sub-section has to be determined in the light of the regulations framed under provisions of this Act. Section 30 of the Act confers power on the Council to make regulations by notification in the *Gazette of India* for the purpose of carrying out the object of the Act and it provides that a copy of such regulation should be sent to each member of the Institute. Section 30, sub-section (2) sets out the several topics in respect of which regulations can be framed though, as usual, it provides that the enumeration of the different topics is without prejudice to the generality of the powers conferrred by section 30, sub-section (1). Sub-section (4) lays down that, notwithstanding anything contained in sub-sections (1) and (2), the Central Government may frame the first regulations for the purposes mentioned in this section, and such regulations shall be deemed to have been made by the Council and shall remain in force from the date of coming into force of this Act until they are amended, altered or revoked by the Council. Regulation 78 is one of the regulations originally framed by the Central Government under section 30, sub-section (4). It reads thus:

> "*Regulation* 78.—Without prejudice to the discretion vested in the Council in this behalf, a Chartered Accountant may act as liquidator, trustee, executor, administrator, arbitrator, receiver, adviser or as representative for costing financial and taxation matter or may take up an appointment that may be made by Central or State Governments and Courts of Law or any Legal Authority, or may act as Secretary in his professional capacity not being an employment on a salary-cum-full time basis."

The last clause has been added by the Council by a notification, dated August 22, 1953. Now it is clear that when the respondent accepted his appointment as liquidator of the three companies in question he agreed to work as a liquidator in pursuance of an order passed by the High Court of Judicature at Calcutta and there can be no doubt that in working as such liquidator he was rendering services which in the opinion of the Council may be rendered by a chartered accountant. The provisions of Regulation 78 must inevitably be considered in the light of section 2, sub-section (2), clause (iv) and the result of considering the two provisions together obviously is that when the respondent was working as a liquidator in pursuance of an order passed by the Calcutta High Court he must be deemed to be in practice within the meaning of section 2, sub-section (2). We feel no difficulty in holding that chartered accountants who render services falling within section 2, sub-section (2), clause

(iv) are as much entitled to be deemed to be in practice as those whose duties attract the provisions of clauses (i), (ii) and (iii) of sub-section (2). If that be the true position it is difficult to accept the view that the conduct of the respondent while he discharged his duties as a liquidator is not the professional conduct of a chartered accountant even within the narrow and restricted sense of the term. If, while acting as liquidator, the respondent must be deemed to be in practice as a chartered accountant, all acts and omissions proved against him in respect of such conduct as liquidator must be characterised as his professional acts and omissions. "Practice" according to Webster's New International Dictionary means "exercise of any profession or occupation" and if the performance of the duties as liquidator attracts the provisions of section 2, sub-section (2), whatever the chartered accountant does as a liquidator must be held to be conduct attributable to him in the course of his practice. The object with which clause (iv) in sub-section (2) of section 2 has been deliberately introduced by the Legislature, in our opinion, appears to be to bring within the disciplinary jurisdiction of the statutory bodies recognized under the Act, conduct of chartered accountants even while they are rendering services otherwise than as chartered accountants properly so-called. It is because the Legislature wanted to provide for a self-contained code of conduct in respect of chartered accountants that the denotation of the expression " to be in practice" has been in a sense deliberately and artificially extended by virtue of section 2, sub-section (2), clause (iv). We must, therefore, hold that, on the facts proved, the respondent is clearly guilty of professional misconduct.

This would really dispose of the appeal, before us because once it is held that the respondent is guilty of professional misconduct it would be obviously necessary to deal with him on that basis and make an appropriate order under section 21, sub-section (3) of the Act. However, since the learned Attorney-General has alternatively urged before us that in confining exercise of disciplinary jurisdiction only to cases of professional misconduct, technically so-called, the learned Judges of the Calcutta High Court have misconstrued the relevant provisions of the Act, we propose to deal very briefly with that question also.

Section 21, sub-section (1) deals with two categories of cases in which the alleged misconduct of members of the Institute can be inquired into. If information is received or complaint is made to the Institute against the conduct of any chartered accountant, the Council is not bound to hold an inquiry straightaway. The Council is required to examine the nature of the information or complaint made and decide whether, if the facts alleged against the member are proved, they would render the member unfit to be a member of the Institute. In other words, in the case of a private complaint made against members, it is only where the Council is satisfied *prima facie* that facts alleged against the member, if proved, would justify the exercise of disciplinary jurisdiction against the member that the Council is required to hold an inquiry. The conduct alleged must be such as, if proved, would render the member unfit to be a member of the Institute. The other class of cases has reference to the complaint received by the Council from the Central Government. In regard to this class of cases, the Council is not required,—and indeed has no jurisdiction to apply the *prima facie* test—before holding an inquiry. The Council is required to cause an inquiry to be held on such complaint straightaway. In both the cases when the inquiry is concluded, the findings of the Council are to be forwarded to the High Court. Section 22 purports to define the expression " conduct which, if proved, will render a person unfit to be a member of the Institute ". It is an inclusive definition ; it includes any act or omission specified in the Schedule but the latter portion of section 22 clearly lays down that nothing contained in this section shall be construed to limit or abridge in any way the power conferred on the Council under sub-section (1) of section 21. The position thus appears to be that though the definition of the material expression used in section 21, sub-section (1) refers to the acts and omissions specified in the Schedule, the list of the said acts and omissions is not exhaustive ; and, in any event, the said list does not purport to limit the powers of the Council under section 21, sub-section (1) which may otherwise flow

from the words used in the said sub-section itself. The Schedule to which section 22 refers has enumerated in clauses (*a*) to (*v*) several acts and omissions and it provides that, if any of these acts or omissions is proved against a chartered accountant, he shall be deemed to be guilty of professional misconduct which renders him unfit to be member of the Institute. Clause (*v*) is rather general in terms since it provides for cases where the accountant is guilty of such other act or omission in his professional capacity as may be specified by the Council in this behalf by notification in the *Gazette of India*. It must be conceded that the conduct of the respondent in the present case cannot attract any of the provisions in the Schedule and may not therefore be regarded as falling within the first part of section 22; but if the definition given by section 22 itself purports to be an inclusive definition and if the section itself in its latter portion specifically preserves the larger powers and jurisdiction conferred upon the Council to hold inquiries by section 21, sub-section (1) it would not be right to hold that such disciplinary jurisdiction can be invoked only in respect of conduct falling specifically and expressly within the inclusive definition given by section 22. In this connection it would be relevant to mention section 8 which deals with disabilities. Section 8, sub-sections (v) and (vi) support the argument that disciplinary jurisdiction can be exercised against chartered accountants even in respect of conduct which may not fall expressly within the inclusive definition contained in section 22. We, therefore, take the view that, if a member of the Institute is found, *prima facie*, guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provisions of the Schedule, it would still be open to the Council to hold an inquiry against the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court under section 21, sub-section (3). It is true that the High Court would take action against the offending member only if the High Court accepts the finding made by the Council and not otherwise. This conclusion is strengthened if we bear in mind the extended meaning of the expression "to be in practice" given in section 2, sub-section (2) which we have already dealt with. In this view of the matter we must reverse the conclusion of the learned Judges of the Calcutta High Court that the conduct proved against the respondent does not fall within sections 21 and 22 because it is not conduct connected with the exercise of his profession as a chartered accountant in the narrow sense of that term.

The next question to consider is in regard to the extent of the jurisdiction and powers of the High Court when the High Court deals with references under section 21, sub-sections (2), (3) and (4). The learned Judges of the Calcutta High Court took the view that even if they had agreed to put a wider construction on the material words used in sections 21 and 22, they would not be justified in passing any orders against the respondent in the present proceedings because the finding which had been referred to the High Court was only one and that was that the respondent was guilty of professional misconduct in the narrow sense of the term. In other words, the High Court thought that in accepting, and acting on, the larger construction of the material words the High Court would be making out a new case on the reference and the High Court would not be justified in adopting such a course. In our opinion, this view is not well-founded. Section 21, sub-section (2) lays down the procedure to be followed by the High Court when a finding made by the Council is referred to it under section 21, sub-section (1). Notice of the day fixed for the hearing of the reference has to be given to the parties specified in section 21, sub-section (1) and an opportunity of being heard has to be given to them. Section 21, sub-section (3) then lays down that the High Court may either pass such final orders on the case as it thinks fit or refer it back for further inquiry by the Council and, upon receipt of the finding after such inquiry, deal with the case in the manner provided in sub-section (2) and pass final orders thereon. It is clear that, in hearing references made under section 21, sub-section (1), the High Court can examine the correctness of the findings recorded by the statutory bodies in that behalf. The High Court can even refer the matter back for further inquiry by the Council and call for a fresh finding. It is not as if the High Court is bound

in every case to deal with the merits of the finding as it has been recorded and either to accept or reject the said finding. If, in a given case it appears to the High Court that, on facts alleged and proved, an alternative finding may be recorded, the High Court can well send the case back to the Council with appropriate directions in that behalf. The powers of the High Court under section 21, sub-section (3) are undoubtedly wide enough to enable the High Court to adopt any course which in its opinion will enable the High Court to do complete justice between the parties. Besides, in the present case, no such technical considerations can really come into operation because the material facts have not been in dispute between the parties at any stage of the proceedings. The only point in dispute between the parties has been whether on the facts proved disciplinary jurisdiction can be invoked against the respondent under the provisions of the Act. We, therefore, take the view that the learned Judges of the High Court were in error in holding that, even if they had accepted the broader interpretation of section 21 and section 22, they could not make an appropriate order in the present case against the respondent having regard to the specific finding recorded by the Council in the inquiry in question.

It would now be necessary to refer to some judicial decisions to which our attention has been invited. In *G. M. Oka*, In re[1], it has been held by a Division Bench of the Bombay High Court that, when a chartered accountant gives evidence before a Court of law and he is in the witness-box not as a chartered accountants but as a witness, the falsity of his statement does not give rise to any disciplinary proceedings against him as a chartered accountant. If he gives false evidence he may be guilty of perjury and if he is convicted the conviction itself may call for disciplinary action. These observations undoubtedly lend support to the view taken by the Calcutta High Court. It is of course true that the conviction of a chartered accountant would attract the provisions of section 8, sub-section (vi) and in that sence the conclusion of the Bombay High Court that the conviction itself may be the basis of disciplinary action is, with respect, wholly correct; but the other observations on which reliance is placed by the respondent before us are *obiter* and it also appears from the judgment that the attention of the learned Judges was not drawn to the provision of section 2 (2) (iv) and other relevant considerations do not appear to have been urged before them in that case. As the judgment itself points out, apart from the technical points which were urged before the Court on behalf of the chartered accountant, there was a large volume of other evidence produced against him which conclusively proved that he was guilty of misconduct. Mr. Aswini Kumar Ghosh, for the respondent, has also sought to rely on *Haseldine* v. *Hosken*[2]. In this case the solicitor had taken out an indemnity policy which insured him against loss arising by reason of any neglect, omission or error while acting in his professional capacity. During the subsistence of this policy, the solicitor sustained loss through having, without realising the fact, entered into a champertous agreement. When the solicitor made a claim to be indemnified, it was held that the loss in respect of which indemnity was claimed did not arise by reason of any neglect, omission or error committed by the solicitor in his professional capacity but arose from his entering into a personal speculation. We do not see how this case can assist the respondent in any way. In considering the question as to whether the respondent has been guilty of professional misconduct in the present case, we are concerned with the material provisions of the Chartered Accountants Act itself. Observations made by the learned Judges in *Haseldine's case*[2], can afford no assistance to us in interpreting the said provisions. Similarly, the decision in *Krishnaswamy* v. *The Council of the Institute of Chartered Accountants*[3], where the Court was primarily concerned with the question as to whether orders passed under section 21(2) of the Act are orders passed in civil proceedings or not is wholly inapplicable and gives us no help in deciding the points before us.

The only question which now remains to be considered is the final order to be passed against the respondent. The conduct of the respondent is, in our opinion,

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1. 22 Company Cases 168.
2. L.R. (1933) 1 K.B. 822.
3. (1952) 2 M.L.J. 646: I.L.R. (1953) Mad. 862 : A.I.R. 1953 Mad. 79.

wholly unworthy of a chartered accountant in practice. His refusal to give prompt replies to the letters received from the Assistant Controller of Insurance followed by his failure to return the documents and all securities and cash received by him as liquidator leave no room for doubt that he was unable to return the said amount and the said securities and cash and that he was merely employing delaying tactics with the object of postponing the evil day. It is not conduct which is only technically improper or unworthy; it is conduct which is grossly improper and unworthy and as such it calls for a deterrent order. The respondent was appointed a liquidator by the Calcutta High Court presumably because he was a chartered accountant in practice. He thus received the benefit of this appointment as a result of his status as chartered accountant in practice and in acting as a liquidator he has been guilty of conduct which is absolutely unworthy of his status and it renders him unfit to be a member of the Institute. We, therefore, think that the ends of justice require that the respondent's name should be removed from the Register for four years. In regard to costs we direct that the respondent should pay the costs of the appellants in this Court and that the parties should bear their own costs in the Court below.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, B. P. SINHA, J. L. KAPUR AND A. K. SARKAR, JJ.

Maulana Abdul Shakur .. *Appellant**

v.

Rikhab Chand and another .. *Respondent.*

Constitution of India (1950), *Article* 102 (1) (a)—*Scope*—*Manager* (mohatmain) *of a school appointed by Durgah Committee appointed by Government under Durgah Khwaja Sahib Act* (*XXXVI of* 1955)—*If disqualified for election to Parliament as one holding an "office of profit under the Government of India"*.

A comparison of the different articles of the Constitution, Articles 58 (2), 66 (4), 162 (1) (a) and 191 (a) dealing with membership of the State Legislatures shows in the case of members of the Legislatures unlike the case of the President and the Vice-President of the union the disqualification arises on account of holding an office of profit under the Government of India or the Governments of the States but not if such officer is under a local or any other authority under the control of these Governments. The power of appointment and dismissal by the Government or control exercised by the Government is an important consideration which determines in favour of the person holding an office of profit under the Government, but the fact that he is not paid from out of the State revenue is by itself a neutral factor. A *mohatmain* (manager) of a school holding his appointment under the Committee of a Durgah Endowment which is a statutory body cannot be disqualified for being chosen as a member of Parliament as holding an appointment by or under the control of the Government of India. Nor is the salary of such person paid out of the revenues of the Government but out of the funds of Durgah endowment.

Appeal by Special Leave from the Judgment and Order, dated the 31st January, 1957, of the Election Tribunal, Ajmer, in Election Petition No. 2 of 1956.

Mukat Behari Lal Bhargava, Senior Advocate (*Naunit Lal*, Advocate, with him), for Appellant.

Respondent No. 1 in person.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal from the order of the Election Tribunal, dated January 31, 1957, setting aside the election of the appellant, Maulana Abdul Shakoor, who was elected to the Council of States by the Electoral College of Ajmer which consisted of 30 members constituting the State Legislature of Ajmer. He received 19 votes as against 7 polled in favour of the other candidate who is respondent No. 1 in this appeal. The total number of valid votes polled was 26 and there were 3 invalid votes. The result of the election was published in the Official Gazette on March

* Civil Appeal No. 335 of 1957. 12th September, 1957.

31, 1956, declaring the election of the appellant. The unsuccessful candidate, the present first respondent, filed his election petition on May 2, 1956. It is not necessary to set out all the allegations in the petition because the main controversy between the parties is whether the successful candidate, the present appellant, held an "office of profit" under the government. The impugned election was held on March 22, 1956.

By a notification, issued on February 17, 1956, the nominations for candidature were to be filed between February 28, 1956, and March 1, 1956. The date for scrutiny was March 5, 1956, and for the polling March 22, 1956. The appellant filed two nomination papers on February 28, 1956, and a third one on March 1, 1956. The respondent Rikhab Chand Jain also filed his nomination papers on March 1, 1956. On March 5, 1956, the respondent Rikhab Chand Jain raised certain objections to the validity of the appellant's nomination, the main ground being that the appellant was holding an office of profit under the government. The Returning Officer by his order, dated March 6, 1956, rejected the two nomination papers of the appellant filed on February 28, 1956, but accepted the third one, *i.e.*, of March 1, 1956, because according to that officer, under the provisions of Durgah Khwaja Sahib (Emergency Provisions) Act, 1950 (Act XVII of 1950) which was in force upto February 29, 1956, the appellant was holding an office of profit under the government but on the coming into force of the Durgah Khwaja Sahib Act (Act XXXVI of 1955) on March 1, 1956, he no longer held such office under the government. On May 3, 1956, the respondent filed an election petition under section 81 of the Representation of the People Act, 1951, in which he submitted that the third nomination paper of the appellant should also have been rejected as even under the provisions of Durgah Khwaja Sahib Act (Act XXXVI of 1955), the appellant was holding an office of profit under the government and therefore his case was covered by the provisions of Article 102 (1) (*a*) of the Constitution. He also prayed that he be declared elected as the votes cast in the appellant's favour were "thrown away" votes and the respondent alone received a majority of valid votes.

A majority of the Election Tribunal by their order, dated January 31, 1957, held that on March 1, 1956, the appellant was holding an office of profit under the government and therefore his nomination paper was hit by Article 102 (1) (*a*) of the Constitution. They set aside his election and accepting the contention as to "thrown away" votes declared the respondent elected. Disagreeing with the majority, the Chairman of the Election Tribunal held that on March 1, 1956, the appellant was no longer holding an office of profit under the Government, his nomination paper was rightly accepted and his election was valid and therefore the respondent could not be declared elected. On the question whether the two nomination papers of the appellant, dated February 28, 1956, were valid or not the Tribunal unanimously held them to be invalid on the ground that the appellant held an office of profit under the government on that date.

It is not necessary to go into the question whether the two nomination papers filed by the appellant on February 28, 1956, were valid or not because if the nomination paper filed on March 1, 1956, is valid the question of their validity would not arise. It may here be stated that the argument before us has proceeded on the assumption that the appellant held an office of profit. The controversy between the parties was therefore confined to whether this office of profit was held under the Government of India and therefore the disqualification for membership under Article 102 (1) (*a*) applies to the appellant. In order to resolve this controversy the important question of construction that arises is; was the appellant holding an office of profit under the Government of India and does Article 102 (1) (*a*) of the Constitution operate? This article is as follows:

"102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(*a*) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;"

This article occurs under the heading "Disqualification of members." In the same part of the Constitution, *i.e.*, Part V are given the disqualifications for election to the offices of President and Vice-President. The relevant part of Article 58 which lays down the disqualification for the office to the President is :

Article 58 (1). No person shall be eligible for election as President unless he—

(a)..

(b)..

(c)..

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or *under any local or other authority subject to the control of any of the said Governments.*"

There is a similar provision in regard to the Vice-President in Article 66 (4).

Counsel has rightly pointed out the difference in the language between the two articles. Whereas in the case of the President and Vice-President the holding of an office of profit under an authority subject to the control of the government is a disqualification, it is not so prescribed in the case of members of the legislatures.

The Madarsa Durgah Khwaja Sahib Akbari in which the appellant held the appointment of a manager (*mohatmin*) is a school for teaching Persian, Arabic and Muslim theology. Before 1951 it was managed and run by the Government of the Nizam of Hyderabad. In 1951, this school was taken over by the Durgah Committee. On February 28, 1955, the appellant was given an honorary appointment of *mohatmin* (manager) of the school by the Administrator of Durgah Khwaja Sahib. He was to work under the Administrator and was to hold charge of the mangement of the school. But from May, 1955, he was being paid Rs. 100 per month which has been variously described as salary and honorarium.

Counsel for the appellant raised three questions of construction that this appointment as manager of the school amounted neither to an office nor to an office of profit under the government. A decision favourable to the appellant on the last question, *i.e.*, office of profit under the government would render the decision of the other two questions wholly unnecessary and therefore assuming that the appellant held an office of profit, the question remains : was it an office of profit under the government and therefore fell within Article 102 (1) (*a*) of the Constitution. In order to determine this we have to examine the provisions of the Statute under which the appointing authority came into existence and its powers under the statute. Before and upto 1936 the Durgah Khwaja Sahib Endowment was administered by a committee which was constituted by the Chief-Commissioner of Ajmer under section 7 of the Religious Endowment Act (Act XX of 1863). In 1936, the then Central Legislature enacted the Durgah Khwaja Sahib Act (Act XXIII of 1936). By the provisions of that Act the management and administration was vested in Durgah Committee constituted under section 4 of the Act. It was a body corporate with perpetual succession and common seal having the right to sue and be sued in the name of the President of the Committee. Under section 5 which dealt with the constitution of the Committee it was to consist of 25 members some of whom were elected and some nominated. Section 11 (*f*) of the Act gave to the Committee the power to appoint all its servants.

The Act of 1936 was replaced by the Durga Khwaja Sahib (Emergency Provisions) Ordinance III of 1949 which in turn III was replaced by the Durgah Khwaja Sahib (Emergency Provisions) Act (Act XXVII of 1950). By section 3 of that Act the Durgah Committee constituted under the Act of 1936 was superseded and the management was vested in an Administrator appointed by the Central Government who under section 7 was to be under the control of the Central Government and had all the powers of the committee constituted under the Act of 1936. That Act continued to be in force upto February 29, 1956, and it was during its continuance that the appellant filed two nomination papers on February 28, 1956, which were rejected by the Returning Officer.

The Act of 1950 was replaced by the Durgah Khwaja Sahib Act (A... of 1955) which received the assent of the President on October 14, 1955, bu... into force on March 1, 1956. Under section 4 (1) of this Act the administration, co... trol, and management of the Durgah Endowment came to be vested in a committee, which is a body corporate having perpetual succession and common seal and which can sue and be sued through its President. Under section 5 the Committee is to consist of not less than 5 and not more than 9 members of the Hanafi Muslim faith all of whom are to be appointed by the Central Government. Section 8 gives power to the Central Government to supersede the Commitee. Under section 9 the Central Government in consultation with the committee can appoint a Nazim (administrator) of the *Durgah* who is an ex-officio secretary of the committee. His salary is to be fixed by the Central Government but is to be paid out of the revenues of the Durgah Endowment Funds. The committee exercises its power of administration, control and management through the Nazim. The powers and duties of the committee are given in section 11 of the Act; clause (i) of this section which is relevant for the purpose of this case when quoted runs as under :

> "*Section* 11.—The powers and duties of the Committee shall be—
>
> ....
>
> (i) to appoint, suspend or dismiss servants of the Durgah Endowment.

Under section 20 the committee has the power to make bye-laws to carry out the purpose of the Act, and the respondent emphasised clause (i) of sub-section 2 which provides :

> "*Section* 20 (2).—In particular and without prejudice to the generality of the foregoing power such bye-laws may provide for—
>
> ....
>
> (i) the duties and powers of the employees of the durgah.

Sub-section (5) of this section is as follows :

> "(5) The Central Government may, after previous publication of its intention, cancel any bye-law which it has approved and confirmed, and thereupon the bye-law shall cease to have effect."

The respondent contended that because under the Act of 1955, the Committee of Management is to be appointed by the Government who also appoint the Nazim (administrator) through whom the committee acts and because under section 6 (2) the government has the power of removal from office of any member of the committee and because the committee can make bye-laws prescribing the duties and powers of the employees of the Durgah, the appellant was under the control and supervision of the Central Government and therefore he was holding an office of profit under the Government of India. It is significant to note that in laying down the disqualifications of the President and the Vice-President the Constitution has expressly provided the disqualifications which include not only an office of profit under the Government of India or the Government of any State but also an office of profit under any local or other authority subject to the control of any of the said governments. This last disqualification the Constitution does not make applicable to the members of the legislatures.

No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the committee or the members of the committee are removable by the Government of India or the committee can make bye-laws prescribing the duties and powers of its employees cannot, in our opinion, convert the servant of the committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removeable by the Government of India nor is he paid out of the revenues of India. The power of the government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of government revenues are important factors in determining whether that person is holding an office of profit under the government though payment from a source other than government revenue is not always a

tor. But the appointment of the appellant does not come within this

A number of election cases reported in the Election Law Reports were cited before us but they were decided on their own facts and are of little assistance in the decision of the present case. The test of the power of dismissal by the government or by an officer to whom such power has been delegated which was pressed in support of his case by the respondent is equally inapplicable to the facts of the present case because the appellant cannot be dismissed by the Government or by a person so authorised by the Government. He is a servant of a statutory body which in the matter of its servants acts within the powers conferred upon it by the statute.

The respondent then sought to fortify his submissions by relying on *Shivanandan Sharma* v. *The Punjab National Bank Ltd.*[1] That was a case under the Industrial Disputes Act and the question for decision was whether a cashier appointed by the Bank's treasurer on behalf of the Bank and paid by the Bank was servant of the Bank. It was held that he was. The rule of that case is that if the master employs a servant and authorises him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for cash consideration, the employees thus appointed by the servant would be, equally with the servant, servants of the master. But that again has no application to the facts of the present case because the appellant has not been employed by a servant of the Government who is authorised to employ servants for doing some service for the Government nor is he paid out of Indian revenues. No doubt the non-payment from out of the revenues of the Union is not always a factor of any consequence but it is of some importance in the circumstances of this case.

A comparison of the different Articles of the Constitution 58 (2), 66 (4), 102 (1) (*a*) and 191 (1) (*a*) dealing with membership of the State Legislatures shows in the case of members of the Legislatures unlike the case of the President and the Vice-President of the Union the disqualification arises on account of holding an office of profit under the Government of India or the Governments of the States but not if such officer is under a local or any other authority under the control of these Governments. As we have said the power of appointment and dismissal by the Government or control exercised by the Government is an important consideration which determines in favour of the person holding an office of profit under the Government, but the fact that he is not paid from out of the State revenue is by itself a neutral factor.

It has not been shown that the appellant's appointment as a mohatmin (manager) of the school satisfied any of the tests which have been discussed above. On the other hand on March 1, 1956, he was holding his appointment under a Committee which is a statutory body and such appointment cannot be called an appointment by or under the control of the Government of India nor is his salary paid out of the revenues of the Government but out of the funds of Durgah endowment. In the circumstances the majority of the Tribunal has erred in holding that the appellant held an office of profit under the Government and the opinion of the Chairman to the contrary lays down the correct position.

In view of this finding in regard to the office of profit under the Government it is not necessary to go into the question whether there were any "thrown away" votes or whether the respondent has been rightly declared to have been elected.

We are of the opinion that the election of the appellant has been wrongly set aside and we would allow the appeal and set aside the order of the majority of the Tribunal. The appellant will have his costs in this Court as also before the Tribunal.

Appeal allowed.

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1. (1955) S.C.J. 407: (1955) 1 M.L.J. (S.C.) 247: (1955) An.W.R. (S.C.) 247: (1955) 1 S.C.R. 1427.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, S. J. IMAM AND P. B. GAJENDRAGADKAR, JJ.

Dhian Singh Sobha Singh and another .. *Appellants**

v.

The Union of India .. *Respondent.*

Bailment—Bailee defaulting to redeliver the goods—Rights and remedies of bailor—Contract Act (*IX of* 1872), *section* 161.

The normal rule is that a bailor in the event of the non-delivery of the goods by the bailee on a demand made by him in that behalf is entitled at his election to sue the bailee either for wrongful conversion of the goods or the wrongful detention thereof and if the bailor pursues his remedy against the bailee for wrongful detention of the goods it would be no answer for the bailee to say that he was guilty of wrongful conversion of the goods at an earlier date which fact of conversion the plaintiff knew or ought to have known at or about that time and is therefore not liable to the plaintiff for wrongful detention thereof; the bailee cannot take advantage of his own wrong and cannot ask the plaintiff to choose a remedy less beneficial to him.

In the instant case the plaintiff issued on termination of bailment the statutory notice under section 80, Civil Procedure Code, and filed shortly after the expiry of the period of two months the action for wrongful detention and there has been no delay by the plaintiffs which would spell out the intention of taking advantage of a rising market or to waive their remedy in wrongful conversion with a view to take advantage of limitation and the action for wrongful detention was rightly instituted against the defendant.

In actions for wrongful detention the only verdict or judgment which the Court can give is that the defendant do deliver to the plaintiff the goods wrongfully detained by him or pay in the alternative the value thereof which can only be ascertained as on the date of the verdict or judgment for the plaintiff; the plaintiff is therefore entitled, in such an action, on default of the defendant in redelivering the goods to him, to payment in the alternative of the value of the goods wrongully detained as on the date of the verdict or judgment, in other words, on the date of the decree.

It is well settled that in an action for wrongful detention the plaintiff is entitled besides the redelivery or payment of its value in the alternative, also to damages for such wrongful detention, damages which would naturally flow from the wrongful act of the defendant. "The unlawful keeping back of what belongs to another is of itself a ground for real damages, not nominal damage at all".

Authorities and case-law reviewed.

Appeal from the Judgment and Decree, dated the 7th April, 1948, of the Nagpur High Court in First Appeal No. 27 of 1945, arising out of the Judgment and Decree, dated the 7th July, 1944, of the Court of Third Additional District Judge, Nagpur, in Civil Suit No. 10-B. of 1943.

N. S. Bindra, Senior Advocate, (*Gyan Singh Vohra*, Advocate, with him), for Appellants.

B. Sen, Senior Advocate (*H. L. Hathi* for *R. H. Dhebar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Bhagwati, J.—This appeal with a certificate of fitness under section 110 of the Code of Civil Procedure raises an important question as to the rights and remedies of a bailor in the event of non-delivery of the goods by the bailee.

The appellants carried on business in partnership in the firm name and style of "Ishwar Singh Dhiansingh" and were the owners of two motor trucks, one bearing No. AWB 230 (V-8 Ford 1938 Model) and the other bearing No. AWB 253 (Oldsmobile Model 1938). On May 4, 1942, the appellants, entered into an agreement for the hiring out of these trucks to the respondent for imparting tuition to the military personnel. Rs. 17 per day per truck was stipulated as the hire and the agreement was terminable on one month's notice by either side.

Pursuant to the said agreement truck No. AWB 230 was handed over to the respondent on April, 29, 1942, and truck No. AWB 253 was given on May 4, 1942.

* C.A. No. 5 of 1954. 29th October, 1957.

The respondent used truck No. AWB 230 from April 29, 1942 to July 31, 1942, excepting the period from June 4, 1942, to June 9, 1942, and truck No. AWB 253 from May 4, 1942, to July 31, 1942, excepting the period from June 1, 1942, to June 9, 1942. On June 29, 1942, the respondent gave notice to the appellants terminating the agreement with effect from August 1, 1942, and asked them to remove the trucks on the the expiration of that period. The appellant No. 1 attended upon the Officer Commanding, 4 M.T.T. Centre, Kamptee, at about 9 A.M. on August 1, 1942, for removing the trucks but they were not delivered to him by the transport in charge and by his letter of the same date addressed to the S.S.O. Kamptee, the appellant No. 1 put the above fact on record.

The respondent did not return the trucks to the appellants nor did it pay any hire charges to them. The respondent took up the position that ths amount of hire had been paid and the trucks had been delivered by it to one Surjan Singh who was alleged to have been a partner of the appellants and thus entitled to receive the said payment and the delivery of the trucks in question. The appellants controverted the said position and claimed that the respondent was liable to pay the hire money as well as return the trucks to them.

On August 4, 1942, the appellants gave the requisite notice under section 80 of the Code of Civil Procedure to the respondent and claimed (i) the hire money up to July 31, 1942, at Rs. 17 per day for AWB 230 from April 29, 1942, and for AWB 253 from May 4, 1942, and interest at 6 per cent. on the hire money from the due date till realization; (ii) damages at Rs. 17 per day per truck from and inclusive of August 1, 1942, onwards till delivery of possession and (iii) return of the trucks Nos. AWB 253 and AWB 230 in good running order with spare wheels, accessories and tools and in good condition or in the alternative Rs. 3,500 being the price of the said two trucks.

The respondent failed and neglected to comply with the requisitions contained in the said letter with the result that on January 8, 1943, the appellants filed a suit against the respondent and the said Surjan Singh claiming the aforesaid reliefs together with future damages from the date of suit the date of the delivery of the trucks and costs.

In the plaint as filed the cause of action was stated to be the failure of the respondent to pay hire money and the non-delivery of the trucks to the appellants by reason of their having been wrongfully delivered by the respondent to the said Surjan Singh. It was averred that the appellants were entitled to the return of their trucks or their value at the date of the decree. The appellants reserved their right to claim excess amount if the price of the trucks at that time was found more than what was claimed by them owing to the rise in prices thereof, by paying additional Court-fee. The action was one for wrongful detention and the appellants claimed a return of the trucks or in the alternative the price thereof at the date of the decree, payment of hire and damages for wrongful detention of the said trucks. The respondent reiterated its contentions in the written statement which it filed and the parties went to a hearing on these pleadings.

The trial Court held that the respondent was not justified in paying the rent and delivering the trucks to the said Surjan Singh. It awarded to the appellants the price of the two trucks which had been fixed by the appellants at Rs.3,500 both in the notice under section 80 of the Code of Civil Procedure and the evidence led on their behalf. It also awarded to the appellants interest on that sum at 6 per cent. per annum by way of damages. It, however, refused to grant any mesne profits holding that for either detention or conversion, the value of the goods on the date of the tort was sufficient compensation. The rent of the trucks was calculated at Rs. 2,380 and it awarded to the appellant that sum together with interest thereon at 6 per cent. per annum from August 1, 1942, to January 7, 1943. It accordingly passed a decree in favour of the appellant for Rs. 6,032-4-0 with proportionate costs against the respondent as well as Surjan Singh.

The appellants preferred an appeal to the High Court of Judicature at Nagpur. They claimed a total sum of Rs. 11,985 as also the highest market value of the trucks. In so far as a decree for Rs. 6,032 had already been passed by the trial Court in their favour, they valued the subject-matter of the appeal at Rs. 5,953 and accordingly furnished Court-fee stamp for that amount.

The Office of the Registrar took objection to the amount of that Court-fee and on February 19, 1945, a Bench of the High Court passed an order that the appellants must pay Court-fee on Rs. 16,626 being the claim for rent from the date of the suit till the date of the filing of the appeal and the appellants accordingly paid the additional Court-fee of Rs. 1,279-11-0 on February 28, 1945.

The appeal was heard by a Division Bench of the High Court on April 1, 1948. The High Court disallowed the appellants' claim for the higher value of the trucks on the ground that the appellants had merely claimed Rs. 3,500 as the price of the said trucks in the notice under section 80 of the Code of Civil Procedure. The learned Judges were of the opinion that although it might be permissible to allow some latitude when the substance of the claim was clear it would not be right to tell the respondent that only Rs. 3,500 was being claimed if the trucks were not returned and then in the suit to demand something like Rs. 14,000. They accordingly upheld the decree of the trial Court in this regard. As regards the claim for damages for wrongful detention of the trucks the learned Judges held that the appellants should be compensated for being deprived of the use of the trucks between August 1, 1942, the date of the breach and July 7, 1944, the date of the trial Court's decree. They, however, observed that the appellants might not have been able to keep the trucks in use for every day all over the period, that there might be days when the trucks would be out of use, that there might be days when there would not be any hirers for the trucks and that there might be days when the trucks would lie idle for repairs and overhaul and so forth. Even though all this was taken into consideration the learned Judges thought that compensation at the rate of Rs. 17 per day per truck for a substantial portion of the period stated above would be fair. Having arrived at the above conclusion the learned Judges observed that the appellants had no doubt paid an additional Court-fee at a later stage but the fact that they had originally limited their claim to Rs. 5,953 showed that they considered that a fair sum in the beginning. The learned Judges therefore limited the enhancement of the trial Court's decree to Rs. 5,953 the sum which the appellant had originally claimed in the appeal. The trial Court's decree was accordingly enhanced by Rs. 5,953 thus allowing the appellant a further sum of Rs. 5,477 for compensation under that head and the appeal was allowed with costs to that extent.

The appellants thereafter applied for a certificate of fitness to appeal under section 110 of the Code of Civil Procedure and hence this appeal.

The two main points which have been urged by the appellants before us are: (i) that the appellant's suit was one for wrongful detention and the appellants were entitled to return of the two trucks or in the alternative to the value thereof as on the date of the decree, that the value of the two trucks at the date of the decree was Rs. 7,000 each and the trial Court should have awarded to them a sum to Rs. 14,000 in the alternative and (ii) that in addition to the above relief the appellants were entitled to damages for wrongful detention of the trucks calculated at the rate of Rs. 17 per day per truck from August 1, 1942, being the date of the accrual of the cause of action till July 7, 1944, which was the date of the decree passed by the trial Court in their favour.

The reply of the respondent was (i) that at its worst the respondent was to the knowledge of the appellant guilty of wrongful conversion of the said trucks from August 1, 1942, and that the appellants were only entitled to damages for wrongful conversion which are commensurate with the price of the trucks at the date of such wrongful conversion and (ii) that even if the appellants were entitled to any further damages since August 1, 1942, they were merely the damages for non-pay-

ment of the value of the trucks by the respondent and should be assessed at only 6 per-cent. interest per annum from the date of such conversion till payment. The respondent further contended that even on the basis of wrongful detention the appellant would not be entitled to anything more than the price of the said trucks as at the date of the trial Court's decree plus nominal damages for the wrongful detention of the trucks from August 1, 1942, till July 7, 1944. In so far however as the High Court had awarded to the appellants the sum of Rs. 5,953 in addition to the sum of Rs. 6,032 already awarded by the trial Court in their favour, the appellants were not entitled to anything more and that therefore the appeal was liable to be dismissed.

It would be relevant to consider what is the exact scope of the two forms of action, *viz.*, action for wrongful conversion and action for wrongful detention, otherwise known as action in trover and action in detinue. A *conversion* is an act of wilful interference without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. If a carrier or other bailee wrongfully and mistakenly delivers the chattel to the wrong person or refuses to deliver it to the right person, he can be sued as for a conversion. Every person is guilty of a conversion, who without lawful justification deprives a person of his goods by delivering them to some one else so as to change the possession. (Salmond on Torts, 11th Edition, pages 323, 324, 330).

The action of detinue is based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by a refusal to deliver it upon demand and the redress claimed is not damages for the wrong but the return of the chattel or its value. If a bailee unlawfully or negligently loses or parts with possession he cannot get rid of his contractual liability to restore the bailor's property on the termination of the bailment and if he fails to do, he may be sued in detinue. (Clerk & Lindsell on Torts, 11th Edition, pages 441 and 442 : paras. 720 and 721).

Detinue at the present day has two main uses. In the first place, the plaintiff may desire the specific restitution of his chattels and not damages for their conversion. He will then sue in detinue, not in trover. In the second place, he will have to sue in detinue if the defendant sets up no claim of ownership and has not been guilty of trespass; but the original acquisition in *detinue sur bailment* was lawful. Detinue lies against him who once had but has improperly parted with possession. At common law the natural remedy for the recovery of chattels was the action in detinue. In that action the judgment was in the alternative—that the plaintiff do recover the possession of the chattels or their assessed value in case possession cannot be had together in any case with damages for their detention. (Salmond on Torts, 11th Edition, pages 351, 352 and 353).

Judgment for the petitioner in trover is for recovery of damages for the conversion: Judgment for the petitioner in detinue is for delivery of the chattel or payment of its value and damages for detention. (Halsbury's Laws of England, Hailsham Edition, Vol. 33, page 78, para. 135).

These forms of action are survivals of the old forms of action in trover and in detinue and it is interesting to note the evolution of the modern causes of action for wrongful conversion or for detention. Denning, J., (as he then was) in *Beaman* v. *A.R.T.S., Ltd*[1], gave the following history of their evolution at page 92 :

"The modern causes of action for wrongful detention or for conversion are very different from the old forms of action for detinue or for trover, and must not be confused therewith. Detinue in its original form was a real action founded on a bailment which was extended later to cases against a finder. It had, however, many procedural disadvantages, and, in particular, the defendant could wage his law. On this account, it was superseded in the course of time by trover, which for over 150 years was in practice the common remedy in all cases of taking away or detention of chattels

1. (1948) 2 All E.R. 89, 92.

or of their misuse or destruction. In 1833 the defendant in detinue lost his right to wage his law. In 1852 the old forms of actions were abolished. In 1854 the plaintiff gained the right to an order for specific delivery of the chattel detained. Since that time there have developed the new causes of action of conversion and wrongful detention, the names of which are derived from the old forms of action, but the substance of which is quite different. I attempt no precise definition, but, broadly speaking, the cause of action in conversion is based on an unequivocal act of ownership by the defendant over goods of the plaintiff without any authority or right in that behalf. The act must be an unequivocal act of ownership, *i.e.*, an act such as acquiring, dealing with, or disposing of the goods, which is consistent only with the rights of an owner as distinct from the equivocal acts of one who is entrusted with the custody or handling or carriage of goods. A demand and refusal is not, therefore, itself a conversion, but it may be evidence of a prior conversion. The cause of action in wrongful detention is based on a wrongful withholding of the plaintiff's goods. It depends on the defendant being in possession of the plaintiff's goods. If such a defendant, without any right so to do, withholds the goods from the plaintiff after the plaintiff has demanded their return, he is, for such time as he so withholds them, guilty of wrongful detention: This is the tort of which a bailee or finder is guilty who is in possession of the goods and fails to deliver them up within a reasonable time after demand, though it may also, in the case of a bailee, be a breach of contract. If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, but the wrongful detention then comes to an end and is swallowed up in the conversion."

Paton on "Bailment in the Common Law" (1952 Edition) has the following observations to make in regard to these two forms of causes of action at page 404 :

"The following maxim has been suggested as a guide for plaintiffs : if the market is falling sue in conversion, if it is rising sue in detinue. This is the orthodox view and it shows that even to-day the distinction between the old forms of action is important".

Whether the plaintiff files an action for wrongful conversion or for wrongful detention this is essentially a matter for his election; he can sue the bailee who has parted with wrongful possession of the goods in favour of a third person either in trover on in detinue or where the goods have been sold he may waive the tort and sue as upon an implied contract for money had or received. (Halsbury's Laws of England, Hailsham Edition, Vol. 33, page 69, para. 115). The defendant cannot be heard to say that the plaintiff knew or ought to have known of the conversion of the goods by him and therefore should pursue his remedy only in conversion. He cannot take advantage of his own wrong. It was held as early as 1858 in *Reeve* v. *Palmer*[1], by Cockburn, C.J.

"It has been held from a very early time that where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action for detinue, though the chattel has ceased to be in his possession at the time of the demand...............

Williams, J., also observed :

" All the authorities, from the most ancient time, shew that it is no answer to an action of detinue when a demand is made for the re-delivery of the chattel to say that the defendant is unable to comply with the demand by reason of his own breach of duty."

The said decision was affirmed in appeal before the Exchequer Chamber and that may be taken to be the settled law on this point.

Wilkinson v. *Verity*[2], also laid down the same principle of election of the remedies and the following observations of Willes, J., at page 210 are apposite :

" The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrongdoer with any answer to the latter.............................

On the other hand, if the action of detinue is resorted to as it may be (Com. Dig. Detinue A) for the purpose of asserting against a person entrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue, *at election*, either for a wrongful parting with the property (if he discovers and can prove it) or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request and that in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor.

....

1. (1858) 5 C.B. (N.S.) 84, 90, 91. 2. (1871) L.R. 6 C.P. 206.

In that case, the principle that a man intrusted with property for safe custody cannot better his position by wrongfully parting with possession of it, but must be answerable as if he retained the possession, was applied both in this Court and in the Exchequer Chamber to the action of detinue...... ....And this is agreeable to the maxim, "*Qui dolo desiit possidere pro possidente Damnatur.*"

It may be noted that this case of *Wilkinson* v. *Verity*[1] was followed by the Court of Appeal in England in *Rosenthal* v. *Alderton & Sons, Ltd.*[2], and by the High Court of Australia in *John F. Goulding Proprietary, Ltd.* v. *The Victorian Railways Commissioners*[3].

It is clear therefore that a bailor in the event of the non-delivery of the goods by the bailee on a demand made by him in that behalf is entitled at his election to sue the bailee either for wrongful conversion of the goods or the wrongful detention thereof and if the bailor pursues his remedy against the bailee for wrongful detention of the goods it would be no answer for the bailee to say that he was guilty of wrongful conversion of the goods at an earlier date which fact of conversion of the goods the plaintiff knew or ought to have known at or about that time and is therefore not liable to the plaintiff for wrongful detention thereof. It is the option of the plaintiff to pursue either remedy against the bailee just as it suits him having regard to all the circumstances of the case and the bailee cannot be heard to say anything to the contrary for the simple reason that he cannot take advantage of his own wrong and cannot ask the plaintiff to choose a remedy which may be less beneficial to him.

This is of course the normal rule, though the Courts have tried to soften its rigour by importing the consideration that the plaintiff should not be allowed to delay his action in order to get the advantage of a rising market. A speculative element might enter into the matter and a shrewd plaintiff might attempt to take unfair advantage of a fluctuating market.

"Just as plaintiff may not waive a conversion so as to pick is own time to demand return and thus evade being statute barred, so he may not bide his time after a conversion so as to make his demand when the market price is highest." (Kialfray (12) Modern Law Review at page 427.).

In the present case, however, we are not fettered by any such consideration. The respondent was the bailee of the two trucks and was bound to return the same to the appellants on the termination of the bailment. The bailment came to an end on August 1, 1942, and the appellants attended the office of the Officer Commanding 4 M.T.T. Centre, Kamptee on the said date for having the trucks re-delivered to them. When the said trucks were not so delivered the appellants immediately on August 14, 1942 gave the statutory notice to the respondent under section 80 of the Code of Civil Procedure . The period of the said notice expired on or about October 14, 1942, and the appellants filed their action for wrongful detention on January 8, 1943. There was no delay on the part of the appellants which would spell out any intention on their part to take advantage of the rising market or to waive their remedy in wrongful conversion with a view to take advantage of the statute of limitation. There is no evidence to show that the market value of the trucks had appreciated perceptibly between August 1, 1942 and January 8, 1943, and it is significant to note that the only claim which the appellants had made in their notice dated August 4, 1942, was for specific delivery of the said trucks by the respondent. Even though the appellants knew that the said trucks had been re-delivered by the respondent to Surjan Singh and they could have, if they had been so minded, sued the respondent for wrongful conversion of the said trucks, they elected to have the said trucks re-delivered to them and asked for the specific delivery thereof and filed their action for wrongful detention of the said trucks. They were, in our opinion perfectly entitled to do so and we have to consider the further questions that arise before us on the basis that the action for wrongful detention had been rightly instituted by the appellants against the respondent.

1. (1871) L.R. 6 C.P. 206.
2. L.R. (1946) 1 K.B. 374.
3. 48 C.L.R. 157, 167.

This leads us to the question as to what relief the appellants a obtain against the respondent. The claim for the rent already due by th to the appellants up to August 1, 1942, has been settled by the judgments below and we are not called upon to canvass these findings of fact a The more important questions that require to be dealt with are : (1) t amount which the appellants are entitled to recover from the responde by way of the value of the two trucks in the alternative—the respond admittedly not in a position to re-deliver the said trucks to them and (2) wh damages which the appellants are entitled to recover by reason of wrongfu tion of the trucks till the date of judgment.

As regards the first question the trial Court unfortunately did not properly appreciate the evidence which was led by the appellants before it. That evidence was given on or about February 1, 1944, more than a year after the institution of the suit and about five months before the date of the decree. The evidence such as it stood was to the effect that the prices of similar trucks had considerably appreciated after August 1, 1942, and broadly stated were at least twice those which obtained on or about that date. The claim of the appellants as laid was no doubt exaggerated and on the evidence the trial Court would not have been justified in awarding to the appellants anything like the sum of Rs. 7,000 per truck which had been claimed. The evidence however was sufficient to enable the trial Court to come to the conclusion that the price of the said two trucks which had been fixed at Rs. 3,500 both in the notice under section 80 of the Civil Procedure Code as well as in the plaint had appreciated at least by 100 per cent. and if the trial Court had come to the conclusion that the appellants were entitled to the value of the trucks as at the date of the judgment it would certainly have been justified in awarding to the appellants an aggregate sum of Rs. 7,000 in the alternative. The trial Court however understood the position in law to be that for either detention or conversion the value on the date of the tort was sufficient compensation and awarded to the appellants only a sum of Rs. 3,500 which was the value thereof on August 1, 1942, together with interest at 6 per cent. per annum as and by way of damages. The trial Court was obviously wrong in awarding this sum and interest to the plaintiff for the reasons which we shall presently discuss.

When the matter went to the High Court the learned Judges of the High Court did not discuss this aspect of the question at all but dismissed the claim of the appellants merely on the ground that the appellants had only claimed Rs. 3,500 in the notice which they had served on the respondent under section 80 of the Code of Civil Procedure and that they were therefore not entitled to recover anything more than the sum of Rs. 3,500 and they accordingly upheld the decree of the trial Court in this behalf.

We are constrained to observe that the approach of the High Court to this question was not well founded. The Privy Council no doubt laid down in *Bhagchand Dagadusa* v. *Secretary of State*[1], that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock, C.B. in *Jones* v. *Nicholls*[2], "We must import a little common sense into notices of this kind." Beaumont, C.J., also observed in *Chandu Lal Vadilal* v. *Government of Bombay*[3]: " One must construe section 80 with some regard to common sense and to the object with which it appears to have been passed...." If the terms of the notice in question be scrutinized in this manner it is abundantly clear that the relief claimed by the appellant was the re-delivery of the said two trucks or in the alternative payment of Rs. 3,500 being the value thereof. The value which was placed by the appellants on the trucks was the then value according to them—a value as on August 1, 1942, the date on which the delivery of the trucks ought to have been given by the respondent to the appellants. The appellants could only have demanded that sum as on the date of that notice. They could not sensibly

1. (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338.
2. (1844) 13 M. & W. 361, 363 ; 153 E.R. 149, 150.
3. I.L.R. (1943) Bom. 128.

enough have demanded any other sum. If the respondent had complied with the terms of that notice then and there and re-delivered the trucks to the appellant, nothing further needed to be done. If on the other hand instead of re-delivering the trucks it paid to the appellant the value thereof then also it need not have paid anything more than Rs. 3,500 to the appellant, on that alternative. If, however, the respondent failed and neglected to comply with the requisitions contained in that notice the appellants would certainly be entitled to recover from the respondent the value of the said trucks in the alternative on the failure of the respondent to re-deliver the same to the appellants in accordance with the terms of the decree ultimately passed by the Court in their favour. That date could certainly not be foreseen by the appellants and it is contrary to all reason and common sense to expect the appellants to have made a claim for the alternative value of the said two trucks as on that date. The respondent was and ought to have been well aware of the situation as it would develop as a result of its non-compliance with the terms of that notice and if on January 8, 1943, the appellants in the suit which they filed for wrongful detention of the said trucks claimed re-delivery of the said trucks or in the alternative Rs. 3,500 as their value and reserved their right to claim the further appreciation in the value of the trucks by reason of the rise in prices thereof up to the date of the decree by paying additional Court-fee in that behalf, it could not be laid at their door that they had not made the specific demand in their notice to the respondent under section 80 of the Code of Civil Procedure and that therefore their claim to recover anything beyond Rs. 3,500 was barred under that section. A common sense reading of the notice under section 80 would lead any Court to the conclusion that the strict requirements of that section had been complied with and that there was no defect in the same such as to disentitle the appellants from recovering from the respondent the appreciated value of the said two trucks as at the date of the judgment. It is relevant to note that neither was this point taken by the respondent in the written statement which it filed in answer to the appellant's claim nor was any issue framed in that behalf by the trial Court and this may justify the inference that the objection under section 80 had been waived. The point appears to have been taken for the first time before the High Court which negatived the claim of the appellants for the appreciated value of the said trucks.

Turning then to the question whether the appellants were entitled to the value of the said trucks in the alternative as at the date of the judgment or at the date of the tort, whether it be conversion or wrongful detention, the position appears to be a little confused. Recent cases indicate that there is much conflict concerning the true rule to apply as to the measure of damages in detinue and conversion. As to the time at which the value of the goods which are the subject-matter of the tort should be assessed it is not certain (*a*) whether the rule is the same in trover as in detinue : (*b*) whether damages should be calculated at the moment of the wrong, or of the verdict or at some intermediate period and (*c*) whether the doctrine of special damage can be so used as to compensate the owner for fluctuations in value (Paton on "Bailment in the Common Law," page 404).

Up to 1946 the trend of the authorities in England was to assess the value of the goods at the date of the breach where the action was for breach of contract and as at the date of the tort where the action was for wrongful conversion or for wrongful detention. There was an old authority of *Mercer* v. *Jones*[1], which laid down that the damages should be the value at the time of the conversion. This authority was relied upon by the Attorney-General in *Greening* v. *Wilkinson*[2], but Abbott, C.J., observed that that case was hardly law, and that the amount of damages was for the jury, who might give the value at the time of the conversion, or at any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. He expressed the opinion that the jury were not all limited in giving their verdict by what was the price of the article on the day of the conversion. This case was considered and not

1. (1813) 3 Camp. 477 : 170 E.R. 1452. 2. (1825) 1 Car. & P. 625 : 171 E.R. 1344.

applied in *Johnson* v. *Hook*[1] and the position which obtained was that the damages were to be assessed on the value of the property at the date of the conversion.

Bodley v. *Reynolds*[2], was an action in trover for goods and chattels comprising of carpenter's tools. Special damages were also claimed and proved and the Court awarded not only the value of the goods at the date of conversion but also special damages as laid in the declaration. Lord Denman, C.J., observed that where special damage was laid and proved, there could be no reason for measuring the damages by the value of the chattel converted. In effect this confirms the position that apart from this circumstance the damages would be measured by the value of the chattel converted which value was taken as at the date of conversion.

Reid v. *Fairbanks*[3] was also an action in trover. It was held that the proper principles on which to estimate such damages, would be, the value of the ship and all her store, etc., on the date when the third party took possession of her ; and that, as a mode of ascertaining such value, the referee should consider what would have been the value of the ship, if she had been completed by the defendant according to his contract with the plaintiff and deduct therefrom the money that would necessarily have been laid out by the defendant after that date, in order to com plete her according to the contract. The value of the ship was thus calculated as at the date of the conversion even though the method of computation was prescribed by the circumstances of the case.

In *S. S. Celia* v. *S. S. Volturno*[4], the House of Lords had to consider the question whether the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date on which the detention occurred or the date on which the damages were assessed or payment made. Lord Buckmaster at page 548 said :

> " A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to havebeen incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the oss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date.
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> ....
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> Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account."

Lord Sumner expressed himself in these terms at page 555 :

> " The matter may be tested in this way. Suppose that, as an incident of the collision, some seaman belonging to the Celia had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the Volturno, and that the former had received and kept it. The owners of the Volturno could have claimed damages for conversion of the notes or their return with damages for their detention, as they chose. In the first case the value of the notes would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken."

The following passage from Lord Wrenbury's speech at page 563 clearly sets out the position in law :

> " The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of

1. (1883) 31 W.R. 812.
2. (1846) 8 Q.B. 779 : 115 E.R. 1066.
3. (1853) 13 C.B. 692 : 138 E.R. 1371.
4. L.R. (1921) 2 A.C. (H.L.) 544, (548).

those damages until the date of the judgment. If such later damages can be recovered as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act".

In *The Arpad*[1], where the plaintiff laid alternative claims in contract and tort it was held that the true measure of damages was the value of the goods at the date of the non-delivery, disregarding circumstances peculiar to the plaintiffs and that on the alternative claim in tort for damages for conversion also, the measure of damages was the same. Scrutton, L.J., observed in the course of his judgment at page 205 :

"In my opinion the damages in conversion should be the value to the purchaser or goods owner at the time of the conversion."

The last case in this series is that of *the Caxton Publishing Co.* v. *Sutherland Publishing Co.*[2]. Lord Porter in his speech at page 201 defines conversion in the terms following:

"As to (3) conversion was defined by Atkin, J., as he then was, in *Lancashire and Yorkshire Rly. Co.* v. *MacNicoll*[3], "Dealing", he said, "with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right".

This definition was approved by Scrutton, L.J., in *Oakley* v. *Lyster*[4]

"Atkin, J., goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner".

After thus defining conversion the learned law Lord proceeded to consider the measure of damages suffered from that act and he observed at page 203 :

"As to (4) there is no dispute as to the principle on which in general the measure of damages of conversion is calculated. It is the value of the thing converted at the date of the conversion, and this principle was accepted by both sides in the present case".

While thus enunciating the principle on which the measure of damages for conversion is to be calculated the noble Law Lord referred to the statement of Abbott, C.J., in *Greening* v. *Wilkinson*[5] and stated :

"I should wish to leave open for consideration in a case in which it directly arises the question whether the statement of Abbott, C.J., in *Greening* v. *Wilkinson*[5], that the jury "may give the value at the time of the conversion or at any subsequent time" can be supported or not".

The catena of authorities quoted above shows that but for the reservation made by Lord Porter in the last mentioned case in regard to the statement of Abbott C.J., in *Greening* v. *Wilkinson*[5], the consensus of opinion was that the damages for tort were to be measured as at the date of the tort, though it may be noted that most of these cases were concerned with wrongful conversion of the goods and not with the wrongful detention thereof.

In 1946 the Court of Appeal in England laid down in the case of *Rosenthal* v. *Alderton & Sons, Ltd.*[6], that in detinue the value of the goods should be measured as at the date of the judgment or verdict, and not at the date of the refusal to return the goods. The action there was one of detinue. The plaintiff who was a tenant of the defendants surrendered his tenancy in June, 1940, and, by arrangement with the defendants left on the premises certain goods belonging to him. In 1943, after his return from a period of military service, the plaintiff found that the goods were missing, some of them having been sold by the defendants. On October 6, 1943. the plaintiff through his solicitors demanded the return of the goods, and on the defendant's refusal to comply, brought an action against them claiming the return of the goods and, in the alternative, the payment to him of their value and damages

1. L.R. (1934) P. 189.
2. L.R. (1939) A.C. 178.
3. 88 L.J. (K.B.) 601, 605.
4. L.R. (1931) 1 K.B. 148, 153.
5. (1825) 1 Car. & P. 625 : 171 E.R. 1944.
6. L.R. (1946) 1 K.B. 374.

for their detention. It was contended on behalf of the defendants that a demand by the plaintiff for the return of the goods having been refused by the defendants several months before the issue of the writ; the proper assessment of the value of such of the goods as had not been returned by the defendants should have been, in accordance with their value on the date when the cause of action arose, which was (as it was claimed), notoriously less than their value as assessed by the official referee after action was brought. This contention of the defendants was negatived and the Court held that in an action of detinue, the value of the goods to be paid by the defendants to the plaintiff in the event of the defendants' failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendants' refusal to return the goods. Evershed, J., who delivered the judgment of the Court dealt with this contention at page 378 as under:

"In our judgment an assessment of the value of the goods detained (and not subsequently returned) at the date of the accrual of the cause of action (*i.e.*, of the refusal of the plaintiff's demand), must presuppose that on that date the plaintiff abandoned his property in the goods: and such a premise is inconsistent with the pursuit by the plaintiff of his action of detinue. The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be, wrongful. Moreover, the plaintiff may recover damages in respect of the wrongful 'detention' after that date, *e.g.*, where the plaintiff has suffered loss from a fall in value of the goods between the date of the defendant's refusal and the date of actual return (See *William* v. *Archer*[1] and such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value. There is (as appears from the forms of judgment mentioned) a clear distinction between the value of the goods claimed in default of their return and damages for their detention, whether returned or not. The date of the refusal of the plaintiff's demand is the date from which the latter commence to run, but appears to be irrelevant to the former and cannot convert a claim for the return of the goods into a claim for payment of their value on that date."

A further contention was urged on behalf of the defendants in that case that the value of certain of the goods which they had in fact sold could not in any event be assessed at any higher value than at the date of the sale. This contention was negatived by the Court in the terms following at page 379:

"In other words they say "We have proved that we converted some of your goods and therefore we can have the benefit of any lower value prevailing at the date of the conversion". It is, however clear that it is no answer for a bailee, when sued in detinue, to say that he has by his owner misconducr incapacitated himself from complying with the lawful damand of the bailor—cf. *Wilkinson* v. *Verity*[2]. It seems to us that the defendants are, in effect, saying "Your real remedy is in conversion," but the bailor can, in such circumstances elect to sue in detinue (at any rate where he was not aware of the conversion at the time), and there is no reason why the value of the goods in fact converted should be assessed on a different basis from the value of the goods which the bailee has not converted but which for some other reason he fails to re-deliver."

These observations are the basis of the headnote which says that the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason.

This decision of the Court of Appeal lays down that where the defendant has been guilty of wrongful conversion of the goods or the wrongful detention thereof, the plaintiff is entitled to damages for such tort committed by the defendant measured at the value of the goods which are the subject-matter of the tort computed as at the date of the verdict or judgment and not at the date of the tort. If this is the true position it would run counter to the rule which had been settled all along up to 1946 that the measure of damages in an action for tort would be the value of the goods at the date of the tort. As a matter of fact Denning, J., (as he then was) commented on this position in *Beaman* v. *A. R. T. S., Ltd.*[3] at page 93:

"A recent decision of the Court of Appeal holds that the damages in such cases are to be assessed at the date of the judgment or verdict in the plaintiff's favour: See *Rosenthal* v. *Alderton & Sons. Ltd.*;[4] but that does not mean that the cause of action accrues at that time. The observations of Lord Goddard, C J., in *Sachs* v. *Miklos*[5], considerably limit the scope of *Rosenthal* v. *Alderton*[4], and should prices hereafter fall, the Courts will probably be faced with the task of reconciling *Rosenthal* v. *Alderton, Ltd.*[4] with the settled rule that damages, whether in contract or tort, are to be assessed as at the date of

1. (1847) 5 C.B. 318.
2. (1871) L.R. 6 C.P. 206.
3. (1948) 2 All E.R. 89, 92.
4. (1946) 1 K.B. 374.
5. (1948) 1 All E.R. 67.

the accrual of the cause of action and that subsequent fluctuations upwards or downwards in rates of exchange or commodity prices, before or during legal proceedings, are irrelevant: *See* the decision of the House of Lords in *S. S. Celia* v. *S. S. Volturno*[1], particularly the speeches of Lord Bukmaster (*at page* 548) of Lord Sumner (*at page* 556) and Lord Wrenbury (*at page* 563) and the long line of cases of buyers who sue sellers for conversion of, or for failure to deliver, goods bargained and sold (such as *France* v. *Gaudet*[2], where the damages are always assessed as at the date of the breach."

The qualification added by the Court of Appeal on the bailor's right to elect to sue in detinue, "at any rate where he was not aware of the conversion at the time", has also been commented upon by Paton on "Bailment in the Common Law" *at page* 405, that on a strict historical basis, this qualification is unnecessary, but the Courts have added it to prevent a plaintiff delaying his action in order to get the advantage of a rising market.

In *Sachs* v. *Miklos*[3], the Court of Appeal discussed the measure of damages in a case that raised the point very neatly. In 1940 a bailor agreed with a bailee that the latter should gratuitously store his furniture in her house. In 1944, the bailee wished to get rid of the furniture and, after fruitless attempts to get in touch with the bailor, sold it. The furniture realised £13 at a public auction. In 1947 the bailor sued for detinue and conversion, and the current value of the furniture was now assessed at £115. Lord Goddard, C.J., (with whom Tucker, L.J., and Jenkins, J., concurred) stated "that the measure of damages is the same in conversion as in detinue, where the facts are only that a defendant has the goods in his possession and could hand them over, and would not do so" and as a result the damages fall to be assessed as at the verdict or judgment. These observations of Goddard, C.J., were understood by Denning, J., in *Beaman* v. *A. R. T. S. Ltd.*[4] as considerably limiting the scope of *Rosenthal* v. *Alderton*[5]. The following comment on the case by Winfield on Tort, 6th Edition at page 442 may be noted with interest :

"It seems, however, that *Rosenthal's case*[5], simply laid down that where the plaintiff sues in detinue the same principle of assessment of damages applies whether the defendant refuses to return the goods because he has converted them or for some other reason fails to return the goods. This hardly warrants the conclusion that the measure of damages is the same in detinue as in conversion. As we have seen the two actions are distinct in their nature and purpose."

Paton on "Bailment in the Common Law" at page 405 has the following comment to make on this position :

"The Court reached a conclusion that was based on common sense and a desire to do justice to both parties, but in certain respects breaks new ground. The crucial question was : What was the plaintiff's loss ? What damage did he suffer by the wrongful act of defendant ? If the plaintiff knew or ought to have known in 1944 of the defendant's intention to sell, the damages would be justly calculated at £13. If he did not know, or ought not to have known, till 1946 that his goods were sold, then the damages should be assessed at £115. The case was remitted to the County Court Judge in order that the facts might be further elucidated. The Court also emphasised one further factor. It was clear that the plaintiff knew of the sale in January, 1946, but he did not begin the action till January, 1957. If the County Court Judge found that there was an undue delay in bringing the action and that there had been a rise in price between 1946 and 1947, then allowance must be made. This point disposes of the criticism that a speculative element enters into the matter and that a shrewd plaintiff might attempt to take unfair advantage of a fluctuating market."

Paton further states that this is an interesting decision, but a short survey of the cases shows that the earlier authorities, especially with regard to conversion, are by no means clear. (*See also* Salmond on Torts, 11th Edition at page 347).

The difficulty, however, arises when there is an increase in the value of the goods which are the subject-matter of the tort between the date of the tort and the date of the verdict or judgment and there is authority for the proposition that any increment in value due to the act of the defendant is not recoverable by the plaintiff. Salmond thus summarises the position in his treatise on Torts ,11th Edition at page 348 :

"If, on the other hand, where the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has not

1. (1921) 2 A.C. (H.L.) 544, 548.
2. (1871) L.R. 6 Q.B. 199.
3. (1948) 2 K.B. 23 : (1948) 1 All E.R. 67.
4. (1948) 2 All E.R. 89, 92.
5. (1946) 1 K.B. 374.

title to it, and his claim is limited to the original value of the chattel. Thus, in *Munro* v. *Willmott*[1] the plaintiff in 1941 deposited a car in the defendant's yard. In 1945, the defendant, after endeavouring without success to communicate with the plaintiff, sold the car, having spent £85 on repairs necessary to put it into a saleable state. Lynskey, J., assessed the value of the car at the date of the judgment as £120, but held " that the defendant is entitled to credit, not from the point of view of payment for what he has done, but in order to arrive at the true value of the property which the plaintiff has lost " : if the repairs had not been done the car could only have been sold for scrap ".

It may be noted that Lynskey, J., approved of this statement of the law as enunciated in Salmond.

Paton, however, in his "Bailment in the Common Law" points out at page 412 that there is a tendency to consider the merits of each case in order to reach a reasonable solution ; although the theoretical rule is that the defendant is entitled to credit, not as payment for what he has done, but rather to arrive at the true value of the property converted. He further points out that American cases also emphasise the state of mind of the tortfeasor. An innocent converter is allowed to deduct the value of his improvements, but one who knowingly commits conversion may be forced to pay damages for the value of the *res* in its improved state. This is justified on the ground that it was fair to award punitive damages where the wrong was wilful.

Where, however, the increase in value is not due to the act of the defendant the plaintiff is also entitled to recover the extra value as special damage resulting from the conversion in addition to the original value of the property converted. The following passage from Paton at page 409 further elucidates this position :

" The plaintiff can always recover, in addition to the value of the property, any special damage which the law does not regard as too remote. Thus if a carpenter's tools are converted, it has been held that he may recover their value and also special damages for the loss of employment. *France* v. *Gaudet*[2], explained this decision on the ground that the defendant had some notice of the existing contract. Such special damage must be pleaded.

If this rule is applied to fluctuations in value, the result is as follows :

(*a*) If the value increases and is highest at the date of verdict, the result is the same as taking the test of the value at the time of verdict, for the plaintiff obtains the value at the time of conversion, and in addition the increase in value as special damages.

(*b*) If the value decreases, then the plaintiff can still secure the value at the time of conversion : he can claim no special damage and the defendant has no claim to reduce the damages.

It is doubtful, however, whether the rule as to special damage should be applied to the question of fluctuations of value. There is some authority for it; but it cannot be regarded as established. If it is accepted, the argument as to the date of the moment of calculating damage loses much of its practical importance.

A commentator in the Harward Law Review[3], states that in measuring damages for conversion the Courts started with the " traditional but over simplified value at the time and place of the wrong ". But where the goods are of such a nature that their value fluctuates greatly the Courts have been prepared to depart from this rule. Thus in New York, where stock is concerned, the Courts allow the owner to recover the highest value to which the stock rose a reasonable time after he learnt of the conversion, the emphasis on the reasonable time being to prevent speculation by delaying unduly the initiation of the action. California allows the highest value reached between the date of the onversion and the time of trial. In Texas the highest intermediate value is allowed in cases of wilful wrong or gross negligence, but only the value at the date of the conversion as against a blameless defendant ". (*See also* Restatement of the Law, Volume on Torts, pages 650 and 653 and 927).

And further at page 410 :

" The decisions illustrate the way in which the merits of the defendant's case have been allowed to determine the technical question of the method of calculating damages. In England, these considerations have not been discussed so openly, but their influence on decisions is seen in the judgment in *Sachs* v. *Miklos*[4], where the question of reasonable speed in bringing the action was discussed and in Lord Atkin's speech in *Solloway* v. *McLaughlin*[5], where he finds delight in using a technical rule to award damages against the unjust steward."

It follows from the above that the position in law in regard to the measure of damages in an action for wrongful conversion is far from clear and the law in regard to the same cannot be said to be perfectly well settled. Whatever be the position

1. L.R. (1949) 1 K.B. 295.
2. L.R. (1871) 6 Q.B. 199.
3. (1947) 61 Harv. L.R. 158.
4. L.R. (1948) 2 K.B. 23 : (1948) 1 All E.R. 67.
5. L.R. (1938) A.C. 247.

in regard to the same in actions for wrongful conversion, one thing is quite clear that in actions for wrongful detention the measure of damages can only be the value of the goods as at the date of the verdict or judgment. The tort is complete the moment the goods are wrongfully converted by the defendant and no question can arise in those cases of any continuing wrong. In a case of wrongful detention. however, the cause of action may certainly arise the moment there is a refusal by the defendant to re-deliver the goods on demand made by the plaintiff in that behalf, But even though the cause of action thus arises on a refusal to re-deliver the said goods to the plaintiff the wrongful detention of the goods is a continuing wrong and the wrongful detention continues right up to the time when the defendant re-delivers the goods either of his own volition or under compulsion of a decree of the Court. There is moreover this distinction between actions for wrongful conversion and those for wrongful detention that in the former the plaintiff abandons his title to the goods and claims damages from the defendant on the basis that the goods have been wrongfully converted by the defendant either to his own use or have been wrongfully dealt with by him. In the latter case, however, the plaintiff asserts his title to the goods all the time and sues the defendant for specific delivery of the chattel or for re-delivery of the goods bailed to him on the basis that he has a title in those goods. The claim for the re-delivery of the goods by the defendant to him is based on his title in those goods not only at the time when the action is filed but right up to the period when the same are re-delivered by the defendant to him. The wrongful detention thus being a tort which continues all the time until the re-delivery of the goods by the defendant to the plaintiff, the only verdict or judgment which the Court can give in actions for wrongful detention is that the defendant do deliver to the plaintiff the goods thus wrongfully detained by him or pay in the alternative the value thereof which can only be ascertained as on the date of the verdict or judgment in favour of the plaintiff.

Winfield thus enunciates the position in his treatise on Tort, 6th Edition, at page 414 :

"The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes, and continues to be, wrongful, and damages are recoverable for wrongful "detention" after that date until the goods are returned or payment of their value. The date of the defendant's refusal cannot convert a claim for the return of the goods into a claim for payment of their value at that date".

It is, therefore, clear that in actions for wrongful detention the plaintiff is entitled on default of the defendant in re-delivering the goods to him, to payment in the alternative of the value of the goods thus wrongfully detained as at the date of the verdict or judgment, in other words, at the date of the decree. We are, therefore, of opinion that the appellants were entitled to recover from the respondent the value of the said trucks which, as has been already stated, was Rs. 7,000 in the alternative, on default committed by the respondent in re-delivery of the same to the appellants.

The next question to consider is what damages are the appellants entitled to recover from the respondent by reason of the wrongful detention of the said trucks from August 1, 1942, up to the date of the decree. It is well settled that in an action for wrongful detention the plaintiff is entitled besides the re-delivery of the chattel or payment of its value in the alternative, also to damages for such wrongful detention. There is however no definite criterion laid down by the decided cases as to what the measure of such damages should be. As was observed by Denning, L.J., in *Strand Electric and Engineering Co., Ltd.*[1] :

"The question in this case is : What is the proper measure of damages for the wrongful detention of goods ? Does it fall within the general rule that the plaintiff only recovers for the loss he has suffered or within some other, and if so what, rule ? It is strange that there is no authority upon this point in English law : but there is plenty on the analogous case of detention of land. The rule there is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So also a wrongdoer who uses land for his own purpose without the owner's consent, as, for instance, for a fair

1. L.R. (1952) 2 Q.B. 246, 253.

ground, or as a way-leave, must pay a reasonable hire for it, even though he has done no damage to the land at all: *Whitwham* v. *Westminster Brymbo Coal Company*[1]. I see no reason why the same principle should not apply to detention of goods."

In that case certain portable switchboards were lent by the plaintiff to a Theatre Co., pending the manufacture and installation by the plaintiffs of permanent switchboards. The hiring out of portable switchboards was a normal part of the plaintiff's business and it was agreed between the plaintiff and the Theatre Co., on a subsequent date that the company should pay to the plaintiff the hiring charges at a certain rate per week. Later on the defendant took possession of the theatre and gave instructions that nothing whatsoever must be removed, and the Theatre Co., disclaimed any responsibility for the plaintiffs hire equipment as from that date. The plaintiffs thereafter wrote a number of letters to the defendant demanding the return of their equipment but received neither their property nor any satisfactory reply, and they issued a writ claiming the return of their equipment or its value, and damages for the period of its detention, which at the trial was shown to be for 43 weeks. The question that arose for consideration was what was the quantum of damages which the plaintiffs were entitled to recover and it was held that in an action in detinue in respect of a chattel which the plaintiff, as part of his business, hires out to users, the plaintiff, if the defendant has during the period of detention made beneficial use of the chattel, is entitled to recover as damages the full market rate of hire for the whole period of detention. After setting out the passage above quoted Denning, L.J., continued at page 254:

"If a wrongdoer has made use of goods for his own purpose, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire."

Mr. B. Sen, who appeared on behalf of the respondent, urged before us on the authority of *Anderson* v. *Passman*[2], that as the gist of the grievance is mere unlawful detention, the damages will be nominal unless the plaintiff proves that he has suffered special damage. This position is, however, of no avail to the respondent because it cannot be said that the appellant's grievance here is merely in regard to the wrongful detention of the trucks. The appellants in this instant case have also claimed to recover from the respondent future damages from the date of detention till the date of delivery of the trucks and apart from any claim laid in special damages, these are damages which naturally flow from the wrongful act of the respondent and which the appellants would be entitled to recover in the event of non-delivery of the trucks to them by the respondent.

This is certainly not a case of nominal damages. As Earl of Halsbury, L.C., pointed out in *Owners of the Steamship "Mediana" v. Owners, Master and Crew of Lightship "Comet"*[3]:

"the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all".

The quantum of damages may be big or small but it does not make any difference to the principle. The principle of assessing the damages is the same and that is that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages[4].

In the case before us the appellants were the owners of the two trucks and they used to hire out the same to others. Hiring out of the trucks was a regular business of theirs and if the said trucks had been re-delivered by the respondent to them on August 1, 1942, they would have immediately put the same to the user

1. L.R. (1896) 2 Ch. 538.
2. L.R. (1835) 7 C. & P. 193.
3. L.R. (1900) A.C. 113, (118).
4. L.R. (1900) A.C. 115, (116).

viz., that of hiring them out to outsiders and earning thereby a certain sum by way of rent for each truck per day. The appellants might not have been able to hire them out for every day of the period of wrongful detention by the respondent *viz.*, from August 1, 1942 to July 7, 1944. As the learned Judges of the High Court have observed, there might be days when the trucks would be out of use : there might be days when the trucks would lie idle for repairs and overhaul and so forth ; that would only go to reduce the number of days for which the appellants would be entitled to recover the damages for such wrongful detention. If the learned Judges of the High Court had on taking all the circumstances into consideration arrived at the figure of Rs. 5,953 as the amount of hire which could have been reasonably earned by the appellants in the event of the re-delivery of the trucks by the respondent to them on August 1, 1942, their judgment in this behalf could not have been successfully impeached. What they did, however, was to confine the appellants' claim to Rs. 5,953 on the ground that the appellants had claimed that amount in the first instance and had paid the Court-fee on the same. They, therefore, took it that that sum of Rs. 5,953 represented a fair amount of damages for wrongful detention of the trucks according to the appellants.

We are of opinion that the High Court was clearly in error in adopting this basis for the award of damages. The payment of Court-fee stamp on Rs. 5,953 was certainly not conclusive against the appellants because on its being pointed out by the Office of the Registrar, the appellants paid an additional Court-fee stamp of Rs. 1,279-11-0 on February 28, 1945, and that was done because the appellants did not confine their claim merely to the said sum of Rs. 5,953. If, according to the judgment of the learned Judges of the High Court the appellants were entitled to damages for the wrongful detention of the said two trucks at the rate of Rs. 17 per day per truck from August 1, 1942 to July 7, 1944, they ought to have made a reasonable calculation of the number of days for which the trucks would have been put to use by the appellants and awarded damages to the appellants accordingly. This, however, they failed to do.

In our opinion, the appellants are entitled to recover such damages from the respondent at the rate of Rs. 17 per truck per day for such reasonable period between August 1, 1942 to July 7, 1944, for which the appellants would have hired out the trucks to outside parties. The trucks were in a fairly good running condition but were old models of 1938 and it will be quite reasonable to hold that they would have been in commission approximately for one year during that period. Calculating the hire of these trucks at the rate of Rs. 17 per truck per day the total amount of damages which the appellants would be entitled to recover from the respondent works out at Rs. 12,410. The appellants would therefore be entitled to recover over and above the sum of Rs. 5,953 already awarded to them by the High Court an additional sum of Rs. 6,457 by way of damages for wrongful detention of the said trucks by the respondent.

We accordingly allow this appeal and pass in favour of the appellants, in addition to the enhanced decree which they have already obtained from the High Court, a decree against the respondent for Rs. 3,500 being the appreciated value of the said trucks together with interest thereon at 6 per cent. per annum from July 7, 1944, till this date as also for a sum of Rs. 6,457 by way of additional damages for wrongful detention of the said trucks, additional proportionate costs both in the trial Court as well as in the High Court as also the costs of this appeal, subject of course to the payment of additional Court-fee for the excess amount awarded hereby. The whole of the decretal amount as above will carry further interest at the rate of 6 per cent. per annum from this date till payment.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. J. IMAM, A. K. SARKAR AND VIVIAN BOSE, JJ.

Sri Venkataramana Devaru and others .. *Appellants**

v.

State of Mysore and others .. *Respondents.*

Madras Temple Entry Authorization Act (*V of* 1947), *section* 3—*Constitutional validity*—*Sri Venkataramana Temple at Moolky*—*If public temple and denominational temple*—*Constitution of India* (1950), *Article* 26 (*b*) *is subject to and controlled by Article* 25 (2) (*b*)—"*Matters of religion*"—*Scope.*

The Sri Venkataramana Temple at Moolky is a public temple as defined in section 2 (2) of Madras Temple Entry Authorization. Act (V of 1947). That temple is a denominational temple founded for the benefit of the Gowda Saraswath Brahmins.

Matters of religion in Article 26 (*b*) of the Constitution of India include even practices which are regarded by the community as part of its religion.

The right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26 (*b*) of the Constitution of India is subject to and can be controlled by, a law protected by Article 25 (2) (*b*), throwing open a Hindu public temple to all classes and sections of Hindus and section 3 of the Madras Temple Entry Authorization Act is a law protected by Article 25 (2) (*b*) of the Constitution.

Appeal from the Judgment and Order, dated the 11th April, 1956, of the Madras High Court in Appeal No. 145 of 1952, arising out of the Judgment and Decree, dated the 31st March, 1951, of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 24 of 1949.

M. K. Nambiar, Senior Advocate (*M. L. Nayak*, Advocate and *J. B. Dadachanji, S. N. Andley, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellants in C.A. No. 403 of 1956 and Respondents in Special Leave Petition No. 327 of 1957.

C. K. Daphtary, Solicitor-General of India (*B. R. L. Iyengar* and *T. M. Sen*, Advocates, with him), for Respondents in C.A. No. 403 of 1956 and Petitioner in Special Leave Petition No. 327 of 1957.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26 (*b*) is subject to, and can be controlled by, a law protected by Article 25 (2) (*b*), throwing open a Hindu public temple to all classes and sections of Hindus.

In the District of South Kanara which formed until recently part of the State of Madras and is now comprised in the State of Mysore, there is a group of three villages, Mannampady, Bappanad and Karnad collectively known as *Moolky Petah ;* and in the village of Mannampady, there is an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity. It is this institution and its trustees, who are the appellants before us. The trustees are all of them members of a sect known as Gowda Saraswath Brahmins. It is said that the home of this community in the distant past was Kashmir, that the members thereof migrated thence to Mithila and Bihar, and finally moved southwards and settled in the region around Goa in sixty villages. They continued to retain their individuality in their new surroundings, spoke a language of their own called *konkani*, married only amongst themselves, and worshipped idols which they had brought with them. Subsequently, owing to persecution by the Portuguese, they migrated further south some of them settling at Bhatkal and others in Cochin. Later on, a chieftain who was ruling over the Moolky area brought five of these families from Bhatkal, settled them at Mannampady,

* Civil Appeal No. 403 of 1956 with Petition for Special Leave to Appeal No. 327 of 1957. — 8th November, 1957.

erected a temple for their benefit and installed their idol therein, which came to be known as Tirumalaivaru or Venkataramana, and endowed lands therefor. In course of time, other families of Gowda Saraswath Brahmins would appear to have settled in the three villages constituting Moolky, and the temple came to be managed by members of this community residing in those villages.

In 1915, a suit O.S. No. 26 of 1915 was instituted in the Court of the Subordinate Judge of South Kanara under section 92 of the Code of Civil Procedure for framing a scheme for this temple. Exhibit A-6 is the decree passed in that suit. It begins by declaring that

> "Shri Venkatramana temple of Moolky situated in the village of Mannampady Madisal Mangane, Mangalore taluk, is an ancient institution belonging to the Gowda Saraswath Brahmin community, i.e., the community to which the parties to the suit belong residing in the Moolky Petah, i.e., the villages of Bappanad, Karnad and Mannampady according to the existing survey demarcation."

Clause 2 of the decree vests the general control and management of the affairs of the temple, both secular and religious, in the members of that community. Clause 3 provides for the actual management being carried on by a Board of Trustees to be elected by the members of the community aforesaid from among themselves. Then follow elaborate provisions relating to preparation of register of electors, convening of meetings of the general body and holding of elections of trustees. This decree was passed on March 9, 1921, and it is common ground that the temple has ever since been managed in accordance with the provisions of the scheme contained therein.

This was the position when the Madras Temple Entry Authorization Act (V of 1947), hereinafter referred to as the Act, was passed by the Legislature of the Province of Madras. It will be useful at this stage to set out the relevant provisions of the Act, as it is the validity of section 3 thereof that is the main point for determination in this appeal. The Preamble to the Act recites that the policy of the Provincial Government was

> "to remove the disabilities imposed by custom or usage on certain classes of Hindus against entry into Hindu temples in the Province which are open to the general Hindu public".

Section 2 (2) defines a temple as

> "place by whatever name known, which is deidcated to or for the benefit of or used as of right by the Hindu community in general as a place of public religious worship."

Section 3 (1) enacts that,

> "Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefor."

Section 6 of the Act provides that,

> "If any question arises as to whether a place is or is not a temple as defined in this Act, the question shall be referred to the Provincial Government and their decision shall be final, subject however to any decree passed by a competent civil Court in a suit filed before it within six months from the date of the decision of the Provincial Government".

It is the contention of the appellants—and that, in our opinion, is well-founded—that the true intent of this enactment as is manifest in the above provisions was to remove the disability imposed on Harijans from entering into temples, which were dedicated to the Hindu public generally.

Apprehending that action might be taken to put the provisions of this Act in operation with reference to the suit temple, the trustees thereof sent a memorial to the Government of Madras claiming that it was a private temple belonging exclusively to the Gowda Saraswath Brahmins, and that it therefore did not fall within the purview of the Act. On this, the Government passed an order on June 25, 1948, Exhibit B-13, that the temple was one which was open to all Hindus generally, and that the Act would be applicable to it. Thereupon, the trustees filed the suit out of which the present appeal arises, for a declaration that the Sri Venkataramana

temple at Moolky was not a temple as defined in section 2 (2) of the Act. It was alleged in the plaint that the temple was founded for the benefit of the Gowda Saraswath Brahmins in Moolky Petah, that it had been at all times under their management, that they were the followers of the Kashi Mutt, and that it was the head of the Mutt that performed various religious ceremonies in the temple, and that the other communities had no rights to worship therein. The plaint was filed on February 8, 1949. On July 25, 1949, the Province of Madras filed a written statement contesting the claim. Between these two dates, the Madras Legislature had enacted the Madras Temple Entry Authorisation (Amendment) Act (XIII of 1949), amending the definition of 'temple' in section 2 (2) of Act V of 1947, and making consequential amendments in the Preamble and in the other provisions of the Act. According to the amended definition, a temple is

> " a place which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship ".

This Amendment Act came into force on June 28, 1949. In the written statement filed on July 25, 1949, the Government denied that the temple was founded exclusively for the benefit of the Gowda Saraswath Brahmins, and contended that the Hindu public generally had a right to worship therein, and that, therfore, it fell within the definition of temple as originally enacted. It further pleaded that, at any rate, it was a temple within the definition as amended by Act XIII of 1949, even if it was dedicated for the benefit of the Gowda Sarswath Brahmins, inasmuch as they were a section of Hindu community, and that, in consequence, the suit was liable to be dismissed.

On January 26, 1950, the Constitution came into force, and thereafter on February 11, 1950, the plaintiffs raised the further contention by way of amendment of the plaint that, in any event, as the temple was a denominational one, they were entitled to the protection of Article 26, that it was a matter of religion as to who were entitled to take part in worship in a temple, and that section 3 of the Act in so far as it provided for the institution being thrown open to communities other than Gowda Saraswath Brahmins, was repugnant to Article 26 (*b*) of the Constitution and was, in consequence, void.

On these pleadings, the parties went to trial. The Subordinate Judge of South Kanara, who tried the suit, held that though the temple had been originally founded for the benefit of certain immigrant families of Gowda Saraswath Brahmins, in course of time it came to be resorted to by all classes of Hindus for worship, and that accordingly it must be held to be a temple even according to the definition of 'temple' in section 2 (2) of the Act, as it originally stood. Dealing with the contention that the plaintiff had the right under Article 26 (*b*) to exclude all persons other than Gowda Saraswath Brahmins from worshipping in the temple, he held that "matters of religion" in that Article had reference to religious beliefs and doctrines, and did not include rituals and ceremonies, and that, in any event Articles 17 and 25 (2) which had been enacted on grounds of high policy must prevail. He accordingly dismissed the suit with costs. Against this decision, the plaintiffs preferred an appeal to the High Court of Madras, A.S. No. 145 of 1952.

It is now necessary to refer to another litigation *inter partes*, the result of which has a material bearing on the issues which arise for determination before us. In 1951, the Madras Legislature enacted the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) vesting in the State the power of superintendence and control of temples and Mutts. The Act created a hierarchy of officials to be appointed by the State, and conferred on them enormous powers of control and even management of institutions. Consequent on this legislation a number of writ applications were filed in the High Court of Madras challenging the validity of the provisions therein as repugnant to Articles 19, 25 and 26 of the Constitution, and one of them was Writ Petition No. 668 of 1951 by the trustees of Sri Venkataramana Temple at Moolky. They claimed that the institution being a denominational one, it had a right under Article 26 (*b*) to manage its own affairs in matters of religion, without interference from any outside authority, and that the provisions of the Act

were bad as violative of that right. By its judgment, dated December 13, 1951, the High Court held that the Gowda Saraswath Brahmin community was a section of the Hindu public, that the Venkataramana Temple at Moolky was a denominational temple founded for its benefit, and that many of the provisions of the Act infringed the right granted by Article 26 (*b*) and were void. Vide *Devaraja Shenoy* v. *State of Madras*[1]. Against this judgment the State of Madras preferred an appeal to this Court, Civil Appeal No. 15 of 1953, but ultimately, it was withdrawn and dismissed on September 30, 1954. It is the contention of the appellants that by reason of the decision given in the above proceedings, which were *inter partes*, the issue as to whether the temple is a denominational one must he held to have been concluded in their favour.

To resume the history of the present litigation : Subsequent to the dismissal of Civil Appeal No. 15 of 1953 by this Court the appeal of the plaintiffs, A.S. No. 145 of 1952, was taken up for hearing and on the application of the appellants, the proceedings in the writ petition were admitted as additional evidence. On a review of the entire materials on record, including those relating to the proceedings in Writ Petition No. 668 of 1951, the learned Judges held it established that the Sri Venkataramana Temple was founded for the benefit of the Gowda Saraswath Brahmin community, and that it was therefore a denominational one. Then, dealing with the contention that section 3 of the Act was in contravention of Article 26 (*b*), they held that as a denominational institution would also be a public institution, Article 25 (2) (*b*) applied, and that, thereunder, all classes of Hindus were entitled to enter into the temple for worship. But they also held that the evidence established that there were certain religious ceremonies and occasions during which the Gowda Saraswath Brahmins alone were entitled to participate, and that that right was protected by Article 26 (*b*). They accordingly reserved the rights of the appellants to exclude all members of the public during those ceremonies and on those occasions, and these were specified in the decree. Subject to this modification they dismissed the appeal. Against this judgment the plaintiffs have preferred Civil Appeal No. 403 of 1956 on a certificate granted by the High Court.

There is also before us Petition No. 327 of 1957 for leave to appeal under Article 136. That has reference to the modifications introduced by the decree of the High Court in favour of the appellants. It must be mentioned that while the appeal was pending, there was a reorganisation of the States, and the District of South Kanara in which the temple is situated, was included in the State of Mysore. The State of Mysore has accordingly come on record in the place of the State of Madras and is contesting this appeal, and it is that State that has now applied for leave to appeal against the modifications. The application is very much out of time, and Mr. M. K. Nambiar, for the appellants, vehemently opposes its being entertained at this stage. It is pointed out that not merely had the State of Madras not filed any application for leave to appeal to this Court against the decision of the Madras High Court but that it accepted it as correct and actually opposed the grant of leave to the appellants on the ground that the points involved were pure questions of fact, that no substantial question of law was involved, and that the judgment of the High Court had recognised the rights of all sections of the Hindu public. It is argued that when a party acquiesces in a judgment and deliberately allows the time for filing an appeal to lapse, it would not be a sufficient ground to condone the delay that he has subsequently changed his mind and desires to prefer an appeal. The contention is clearly sound, and we should have given effect to it, were it not that the result of this litigation would affect the rights of members of the public, and we consider it just that the matter should be decided on the merits, so that the controversies involved might be finally settled. We have accordingly condoned the delay, and have heard counsel on this application. In view of this, it is unnecessary to consider the questions discussed at the Bar as to the scope of Article 132, who are entitled to appeal on the strength of a certificate granted under that Article, and the forum in which the appeal should

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1. (1952) 2 M.L.J. 481.

be lodged. It is sufficient to say that in this case no appeal, was, in fact, filed by the respondent.

On the arguments addressed before us, the following questions fall to be decided :

(1) Is the Sri Venkataramana Temple, at Moolky, a temple, as defined in section 2 (2) of Madras Act V of 1947 ?

(2) If it is, is it a denominational temple ?

(3) If it is a denominational temple, are the plaintiffs entitled to exclude all Hindus other than Gowda Saraswath Brahmins from entering into it for worship, on the ground that it is a matter of religion within the protection of Article 26 (*b*) of the Constitution ?

(4) If so, is section 3 of the Act valid on the ground that it is a law protected by Article 25 (2) (*b*), and that such a law prevails against the right conferred by Article 26 (*b*) ; and

(5) If section 3 of the Act is valid, are the modifications in favour of the appellants made by the High Court legal and proper ?

On the first question, the contention of Mr. M.K. Nambiar, for the appellants, is that the temple in question is a private one, and therefore falls outside the purview of the Act. This plea, however, was not taken anywhere in the pleadings. The plaint merely alleges that the temple was founded for the benefit of the Gowda Saraswath Brahmins residing in Moolky Petah. There is no averment that it is a private temple. It is true that at the time when the suit was instituted, the definition of 'temple' as it then stood, took in only institutions which were dedicated to or for the benefit of the Hindu public in general, and it was therefore sufficient for the plaintiffs to aver that the suit temple was not one of that character, and that it would have made no difference in the legal position whether the temple was a private one, or whether it was intended for the benefit of a section of the public. But then, the Legislature amended the definition of 'temple' by Act XIII of 1949, and brought within it even institutions dedicated to or for the benefit of a section of the public; and that would have comprehended a temple founded for the benefit of the Gowda Sarswath Brahmins but not a private temple. In the written statement which was filed by the Government, the amended definition of 'temple' was in terms relied on in answer to the claim of the plaintiffs. In that situation, it was necesssry for the plaintiffs to have raised the plea that the temple was a private one, if they intended to rely on it. Far from putting forward such a plea, they accepted the stand taken by the Government in their written statement, and simply contended that as the temple was a denominational one, they were entitled to the protection of Article 26 (*b*). Indeed, the Subordinate Judge states in para. 19 of the judgment that it was admitted by the plaintiffs that the temple came within the purview of the definition as amended by Act XIII of 1949.

Mr. M. K. Nambiar invited our attention to Exhibit A-2, which is a copy of an award, dated November 28, 1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Sarswath Brahmins. He also referred us to Exhibit A-6, the decree in the scheme suit, O.S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials, and that, nothwithstanding that the point was not taken in the pleadings, it could be allowed to be raised as a pure question of law. We are unable to agree with this submission. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence; to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. We have

accordingly declined to entertain this contention. We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Moolky is a public temple, and that it is within the operation of Act V of 1947.

(2) The next question is whether the suit temple is a denominational institution. Both the Courts below have concurrently held that at the inception the temple was founded for the benefit of Gowda Saraswath Brahmins; but the Subordinate Judge held that as in course of time public endowments came to be made to the temple and all classes of Hindus were taking part freely in worship therein, it might be presumed that they did so as a matter of right, and that, therefore, the temple must be held to have become dedicated to the Hindu public generally. The learned Judges of the High Court, however, came to a different conclusion. They followed the decision in *Devaraja Shenoy* v. *State of Madras*[1] and held that the temple was a denominational one. The learned Solicitor-General attacks the correctness of this finding on two grounds. He firstly contends that even though the temple might have been dedicated to the Gowda Sarswath Brahmins, that would make it only a communal and not a denominational institution, unless it was established that there were religious tenets and practices special to the community, and that that had not been done. Now, the facts found are that the members of this community migrated from *Gowda Desa* first to the Goa region and then to the south, that they carried with them their idols, and that when they were first settled in Moolky, a temple was founded and these idols were installed therein. We are therefore concerned with the Gowda Sarswath Brahmins not as a section of a community but as a sect associated with the foundation and maintenance of the Sri Venkataramana Temple, in other words, not as a mere denomination, but as a religious denomination. From the evidence of P.W. 1, it appears that the Gowda Saraswath Brahmins have three *gurus* that those in Moolky Petah are followers of the head of the Kashi Mutt and that it is he that performs some of the important ceremonies in the temple. Exhibit A is a document of the year 1826-27. That shows that the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders. The uncontradicted evidence of P.W. 1 also shows that during certain religious ceremonies, persons other than Gowda Saraswath Bahmins have been wholly excluded. This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants.

The second ground urged on behalf of the respondent is that the evidence discloses that all communities had been freely admitted into the temple, and that though P.W. 1 stated that persons other than Gowda Saraswath Brahmins could enter only with the permission of the trustees, there was no instance in which such permission was refused. It was contended that the inference to be drawn from this was that the Hindu public generally had a right to worship in the temple. The law on the subject is well-settled. When there is a question as to the nature and extent of a dedication of a temple, that has to be determined on the terms of the deed of endowment if that is available, and where it is not, on other materials legally admissible ; and proof of long and uninterrupted user would be cogent evidence of the terms thereof. Where, therefore, the original deed of endowment is not available and it is found that all persons are freely worshipping in the temple without let or hindrance, it would be a proper inference to make that they do so as a matter of right, and that the original foundation was for their benefit as well. But where it is proved by production of the deed of endowment or otherwise that the orignal dedication was for the benfit of a particular community, the fact that members of other communities were allowed freely to worship cannot lead to the inference that the dedication was for their benefit as well. For, as observed in *Babu Bhagwan Din* v. *Gir Har Saroop*[2], "it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away." On the findings of the Court below that the foundation was originally for the benefit of the Gowda Saraswath Brahmin community, the fact that other classes of Hindus were admitted freely into the temple would not have the effect of enlarging the scope of the dedication into one for the public generally. On a consi-

1. (1952) 2 M.L.J. 481. 2. (1940) 1 M.L.J. 1: (1939) L.R. 67 I.A. 1 (P.C.).

deration of the evidence, we see no grounds for differing from the finding given by the learned Judges in the Court below that the suit temple is a denominational temple founded for the benefit of the Gowda Saraswath Bahmins, supported as it is by the conclusion reached by another Bench of learned Judges in *Devaraja Shenoy* v. *State of Madras*[1]. In this view, there is no need to discuss whether this issue is *res judicata* by reason of the decision in Writ Petition No. 668 of 1951.

(3) On the finding that the Sri Venkataramana Temple at Moolky is a denominational institution founded for the benefit of the Gowda Saraswath Brahmins, the question arises whether the appellants are entitled to exclude other communities from entering into it for worship on the ground that it is a matter of religion within the protection of Article 26 (*b*). It is argued by the learned Solicitor-General that exclusion of persons from entering into a temple cannot *ipso facto* be regarded as a matter of religion, that whether it is so must depend on the tenets of the particular religion which the institution in question represents, and that there was no such proof in the present case. Now, the precise connotation of the expression "matters of religion" came up for consideration by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[2], and it was held therein that it embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its *Gnana* but also its *Bhakti* and *Karma Kandas*. The following observations of Mukherjea, J., (as he then was) are particularly apposite to the present discussion :

> " In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character ; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26 (*b*)."

It being thus settled that matters of religion in Article 26 (*b*) include even practices which are regarded by the community as part of its religion, we have now to consider whether exclusion of a person from entering into a temple for worship is a matter of religion according to Hindu ceremonial law. There has been difference of opinion among the writers as to whether image worship had a place in the religion of the Hindus, as revealed in the Vedas. On the one hand, we have hymns in praise of Gods, and on the other, we have highly philosophical passages in the *Upanishads* describing the Supreme Being as omnipotent, omniscient and omnipresent and transcending all names and forms. When we come to the *puranas*, we find a marked change. The conception had become established of Trinity of Gods, Brahma, Vishnu and Siva as manifestations of the three aspects of creation, preservation and destruction attributed to the Supreme Being in the Upanishads, as, for example, in the following passage in the *Taittiriya Upanishad*, *Brigu Valli*, First *Anuvaka* :

> "That from which all beings are born, by which they live and into which they enter and merge."

The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have beecome the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity,

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1. (1952) 2 M.L.J. 481.

2. (1954) 1 M.L.J. 596: 1954 S.C.J. 335 (1954) S.C.R. 1005.

and numerous are the treatises that came to be written for its exposition. These are known as *Agamas*, and there are as many as 28 of them relating to the *Saiva* temples, the most important of them being the *Kamikagama*, the *Karanagama* and the *Suprabhedagama*, while the *Vikhanasa* and the *Pancharatra* are the chief *Agamas* of the *Vaishnavas*. These *Agamas* contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other *Devatas* are to be installed and where the several classes of worshippers are to stand and worship. The following passage from the judgment of Sadasiva Aiyar, J., in *Gopala Muppanar* v. *Subramania Aiyar*[1], gives a summary of the prescription contained in one of the *Agamas* :

> "In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbhagriham, Brahmins from the ante chamber or Sabah Mantabham, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram."

The other *Agamas* also contain similar rules.

According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as *Samprokshana*) have to be performed for restoring the sanctity of the shrine. *Vide* judgment of Sadasiva Aiyar, J., in *Gopala Muppanar* v. *Subramania Aiyar*.[1] In *Sankaralinga Nadan* v. *Raja Rajeswara Dorai*[2], it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Article 25 which after declaring that all persons are entitled freely to profess, practise and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must accordingly hold that if the rights of the appellants have to be determined solely with reference to Article 26 (*b*), then section 3 of Act V of 1947, should be held to be bad as infringing it.

(4) That brings us on to the main question for determination in this appeal, whether the right guaranteed under Article 26 (*b*) is subject to a law protected by Article 25 (2) (*d*) throwing the suit temple open to all classes and sections of Hindus. We must now examine closely the terms of the two Articles. Article 25, omitting what is not material, is as follows :

> "(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.
>
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
>
> . . . .
>
> (*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus".

Article 26 runs as follows:

> "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
>
> (*a*) to establish and maintain institutions for religious and charitable purposes ;
>
> (*b*) to manage its own affairs in matters of religion ;
>
> (*c*) to own and acquire movable and immovable property ; and
>
> (*d*) to administer such property in accordance with law."

1. (1914) 27 M.L.J. 253.
2. (1908) L.R. 35 I.A. 176 : I.L.R. 31 Mad. 236 : 18 M.L.J. 387 (P.C.).

We have held that matters of religion in Article 26 (*b*) include the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution. Under this Article, therefore, the appellants would be entitled to exclude all persons other than Gowda Saraswath Brahmins from entering into the temple for worship. Article 25 (2) (*b*) enacts that a law throwing open public temples to all classes of Hindus is valid. The word 'public' includes, in its ordinary acceptation, any section of the public, and the suit temple would be a public institution within Article 25 (2) (*b*), and section 3 of the Act would therefore be within its protection. Thus, the two Articles appear to be apparently in conflict. Mr. M. K. Nambiar contends that this conflict could be avoided if the expression "religious institutions of a public character" is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Article 25 (2) (*b*) as not being dedicated for the Hindu community in general. He sought support for this contention in the law relating to the entry of excluded classes into Hindu temples and in the history of legislation with reference thereto, in Madras.

According to the Agamas, a public temple enures, where it is not proved to have been founded for the benefit of any particular community, for the benefit of all Hindus including the excluded classes. But the extent to which a person might participate in the worship therein would vary with the community in which he was born. In *Venkatachalapathi* v. *Subbarayadu*[1], the following statement of the law was quoted by the learned Judges with apparent approval :

> "Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Banyas can go into the hall of the temple. Brahmins can go into the holy of the holies."

In *Gopala Muppanar* v. *Subramania Aiyar*[2], Sadasiva Aiyar, J., observed as follows at page 258:

> " It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and some times not beyond the temple outer gate)and they could not have a sight of the images other than the procession images brought out at the times of festivals."

The true position, therefore, is that the excluded classes were all entitled to the benefit of the dedication, though their actual participation in the worship was insignificant. It was to remove this anomaly that legislation in Madras was directed for near a decade. First came the Malabar Temple Entry Act (Madras Act XX of 1938). Its object was stated to be "to remove the disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into, and offering worship in, Hindu temples." Section 2 (4) defined 'temple' as "a place which is used as a place of public worship by the Hindu community generally except excluded classes.. ..". Sections 4 and 5 of the Act authorised the trustees to throw such temples open to persons belonging to the excluded classes under certain conditions. This Act extended only to the District of Malabar. Next came the Madras Temple Entry Authorisation and Indemnity Act (Madras Act XXII of 1939). The Preamble to the Act states that "there has been a growing volume of public opinion demanding the removal of disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into and offering worship in Hindu temples", and that " it is just and desirable to authorize the trustees in charge of such temples to throw them open to....the said classes." Section 3 of the Act authorised the trustees to throw open the temples to them. This Act extended to the whole of the Province of Madras. Then we come to the Act, which has given rise to this litigation, Act V of 1947. It has been already mentioned that, as originally passed, its object was to lift the ban on the entry into temples of communities which are excluded by custom from enter-

1. (1890) I.L.R. 13 Mad. 293. 2. (1914) 27 M.L.J. 253.

ing into them, and 'temple' was also defined as a place dedicated to the Hindus generally.

Now, the contention of Mr. Nambiar is that Article 25 (2) (*b*) must be interpreted in the background of the law as laid down in *Gopala Muppanar* v. *Subramania Aiyar*[1] and the definition of 'temple' given in the statutes mentioned above, and that the expression "religious institutions of a public character" must be interpreted as meaning institutions which are dedicated for worship to the Hindu community in general, though certain sections thereof were prohibited by custom from entering into them, and that, in that view, denominational temples will fall outside Article 25 (2) (*b*). There is considerable force in this argument. One of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Article 17, which is as follows:

> "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

Construing Article 25 (2) (*b*) in the light of Article 17, it is arguable that its object was only to permit entry of the excluded classes into temples which were open to all other classes of Hindus, and that that would exclude its application to denominational temples. Now, denominational temples are founded, *ex hypothesi*, for the benefit of particular sections of Hindus, and so long as the law recognises them as valid—and Article 26 clearly does that—what reason can there be for permitting entry into them of persons other than those for whose benefit they were founded? If a trustee diverts trust funds for the benefit of persons who are not beneficiaries under the endowment, he would be committing a breach of trust, and though a provision of the Constitution is not open to attack on the ground that it authorises such an act, is it to be lightly inferred that Article 25 (2) (*b*) validates what would, but for it, be a breach of trust and for no obvious reasons of policy, as in the case of Article 17? There is, it should be noted, a fundamental distinction between excluding persons from temples open for purpose of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Article 17 and the latter protected by Article 26, and it is the contention of the appellants that Article 25 (2) (*b*) should not be interpreted as applicable to both these categories and that it should be limited to the former. The argument was also advanced as further supporting this view, that while Article 26 protects denominational institutions of not merely Hindus but of all communities such as Muslims and Christians, Article 25 (2) (*b*) is limited in its operation to Hindu temples, and that it could not have been intended that there should be imported into Article 26 (*b*) a limitation which would apply to institutions of one community and not of others. Article 26, it was contended, should therefore be construed as falling wholly outside Article 25 (2) (*b*), which should be limited to institutions other than denominational ones.

The answer to this contention is that it is impossible to read any such limitation into the language of Article 25 (2) (*b*). It applies in terms to all religious institutions, of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on *a priori* reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of

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1. (1914) 27 M.L.J. 253.

law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Article 25 (2) (*b*).

It is then said that if the expression "religious institutions of a public character" in Article 25 (2) (*b*) is to be interpreted as including denominational institutions, it would clearly be in conflict with Article 26 (*b*), and it is argued that in that situation, Article 26 (*b*) must, on its true construction, be held to override Article 25 (2) (*b*). Three grounds were urged in support of this contention, and they must now be examined. It was firstly argued that while Article 25 was stated to be "subject to the other provisions of this Part" (Part III), there was no such limitation on the operation of Article 26, and that, therefore, Article 26 (*b*) must be held to prevail over Article 25 (2) (*b*). But it has to be noticed that the limitation "subject to the other provisions of this Part" occurs only in clause (1) of Article 25 and not in clause (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion. It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Article 25 (1) is subject is Article 25 (2). A law, therefore, which falls within Article 25 (2) (*b*) will control the right conferred by Article 25 (1), and the limitation in Article 25 (1) does not apply to that law.

It is next contended that while the right conferred under Article 26 (*d*) is subject to any law which may be passed with reference thereto, there is no such restriction on the right conferred by Article 26(*b*). It is accordingly argued that any law which infringes the right under Article 26(*b*) is invalid, and that section 3 of Act V of 1947 must accordingly be held to have become void. Reliance is placed on the observations of this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1] at page 1023, in support of this position. It is undoubtedly true that the right conferred under Article 26 (*b*) cannot be abridged by any legislation, but the validity of section 3 of Act V of 1947 does not depend on its own force but on Article 25 (2) (*b*) of the Constitution. The very Constitution which is claimed to have rendered section 3 of the Madras Act void as being repugnant to Article 26 (*b*) has, in Article 25(2) (*b*), invested it with validity, and therefore, the appellants can succeed only by establishing that Article 25 (2) (*b*) itself is inoperative as against Article 26 (*b*).

And lastly, it is argued that whereas Article 25 deals with the rights of individuals, Article 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Article 25 (2) (*b*). This contention ignores the true nature of the right conferred by Article 25 (2) (*b*). That is a right conferred on " all classes and sections of Hindus " to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Article 25(1) or against a denomination under Article 26 (*b*). The fact is that though Article 25 (1) deals with rights of indidivuduals, Article 25 (2) is much wider in its contents and has reference to the rights of communities, and controls both Article 25 (1) and Article 26 (*b*).

The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25 (2) (*b*) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26 (*b*) in all matters of religion, subject only to this that as regards one aspect of them,

1. (1954) S.C.R. 1005: (1954) 1 M.L.J. 596: 1954 S.C.J. 335.

entry into a temple for worship, the rights declared under Article 25 (2) (*b*) will prevail. While, in the former case, Article 25 (2) (*b*) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26 (*b*). We must accordingly hold that Article 26 (*b*) must be read subject to Article 25 (2) (*b*).

(5) It remains to deal with the question whether the modifications made in the decree of the High Court in favour of the appellants are valid. Those modifications refer to various ceremonies relating to the worship of the deity at specified times each day and on specified occasions. The evidence of P.W. 1 establishes that on those occasions, all persons other than Gowda Saraswath Brahmins were excluded from participation thereof. That evidence remains uncontradicted, and has been accepted by the learned Judges, and the correctness of their finding on this point has not been challenged before us. It is not in dispute that the modifications aforesaid relate, according to the view taken by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1], to matters of religion, being intimately connected with the worship of the deity. On the finding that the suit temple is a denominational one, the modifications made in the High Court decree would be within the protection of Article 26 (*b*).

The learned Solicitor-General for the respondents assails this portion of the decree on two grounds. He firstly contends that the right to enter into a temple which is protected by Article 25 (2) (*b*) is a right to enter into it for purposes of worship, that that right should be liberally construed, and that the modifications in question constitute a serious invasion of that right, and should be set aside as unconstitutional. We agree that the right protected by Article 25 (2) (*b*) is a right to enter into a temple for purposes of worship, and that further it should be construed liberally in favour of the public. But it does not follow from this that that right is absolute and unlimited in character. No member of the Hindu public could, for example, claim as part of the rights protected by Article 25 (2) (*b*) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services, which the Archakas alone could perform. It is again a well-known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated, though at other times, the public in general are free to participate in the worship. Thus, the right recognised by Article 25 (2) (*b*) must necessarily be subject to some limitations or regulations nd one such limitation or regulation must arise in the process of harmonising the right conferred by Article 25(2) (*b*) with that protected by Article 26 (*b*).

We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Article 26 (*b*), must yield to the overriding right declared by Article 25 (2) (*b*) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times, but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Article 25 (2) (*b*) overrides that right so as to extinguish it, but whether it is possible —so to regulate the rights of the persons protected by Article 25 (2) (*b*) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Article 25 (2) (*b*), then of course, on our conclusion that Article 25 (2) (*b*) prevails as against Article 26 (*b*), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Article 25 (2) (*b*) as to give effect to Article 26 (*b*) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

1. (1954) S.C.R. 1005 : (1954) 1 M.L.J. 596 : 1954 S.C.J. 335.

The question then is one of fact as to whether the rights claimed by the appellants are strictly denominational in character, and whether after giving effect to them, what is left to the public of the right of worship is substantial. That the rights allowed by the High Court in favour of the appellants are purely denominational clearly appears from the evidence on record. P.W. 1 put forward two distinct rights on behalf of the Gowda Saraswath Brahmins. He firstly claimed that no one except members of his community had at any time the right to worship in the temple except with their permission; but he admitted that the members of the public were, in fact, worshipping and that permission had never been refused. This right will be hit by Article 25 (2) (*b*), and cannot be recognised. P.W. 1 put forward another and distinct right, namely, that during certain ceremonies and on special occasions, it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded. This would clearly be a denominational right. Then, the question is whether if this right is recognised, what is left to the public of their right under Article 25 (2) (*b*) is substantial. The learned Solicitor-General himself conceded that even apart from the special occasions reserved for the Gowda Saraswath Brahmins, the other occasions of worship were sufficiently numerous and substantial, and we are in agreement with him. On the facts, therefore, it is possible to protect the rights of the appellants on those special occasions, without affecting the substance of the right declared by Article 25 (2) (*b*); and, in our judgment, the decree passed by the High Court strikes a just balance between the rights of the Hindu public under Article 25 (2) (*b*) and those of the denomination of the appellants under Article 26 (*b*) and is not open to objection.

Then, it is said that the members of the public are not parties to the litigation and that they may not be bound by the result of it, and that, therefore the matter should be set at large. Even if the members of the public are necessary parties to this litigation, that cannot stand in the way of the rights of the appellants being declared as against the parties to the action. Moreover, the suit was one to challenge the order of the Government holding that all classes of Hindus are entitled to worship in the suit temple. While the action was pending, the Constitution came into force, and as against the right claimed by the plaintiffs under Article 26 (*b*), the Government put forward the rights of the Hindu public under Article 25 (2) (*b*). There has been a full trial of the issues involved, and a decision has been given, declaring the rights of the appellants and of the public. When the appellants applied for leave to appeal to this Court, that application was resisted by the Government *inter alia* on the ground that the decree of the High Court was a proper decree recognising the rights of all sections of the public. In view of this, there is no force in the objection that the public are not, as such, parties to the suit. It is their rights that have been agitated by the Government and not any of its rights.

In the result, both the appeal and the application for special leave to appeal must be dismissed. The parties will bear their own costs throughout. The appellants will take their costs out of the temple funds.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA AND J. L. KAPUR, JJ.

The Aggarwal Chamber of Commerce, Ltd. . . . *Appellants**

v.

M/s. Ganpat Rai Hira Lal . . *Respondents.*

Income-tax Act (XI of 1922), sections 40 (2) and 42 (1)—Agent of non-resident deducting and paying income-tax—Non-resident foreigner if can claim against the agent that his total world income was not taxable.

The underlying principle of the deduction under sections 40, 41 and 42 of the Income-tax Act is that the person charged with tax is neither the trustee nor the beneficiary as such. The object of

* Civil Appeal No. 79 of 1954. 11th November, 1957.

the Act is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the non-resident principal thought that he was not liable to the payment of any tax he could apply to the Income-tax Officer for refund.

The agent of a non-resident could be held liable under sections 40 (2) and 42 (1) of the Act as an assessee for income-tax on the profits made on the principal's transactions within the taxable territories and therefore entitled under the Proviso to section 42 (1) to retain the estimated amount of income-tax payable on the amount of the principal's profits. Where the agent has so deducted retained and actually paid the tax, that liability cannot be attacked by the non-resident on the ground that his total world income was not taxable and therefore the British Indian Tax Authorities could not levy any tax. The agent having lawfully and properly paid the tax under the Act that amount had been rightly deducted from the profits accruing in the transactions within the taxable territory. As between the parties the tax paid by the agent had to be taken into account irrespective of the ultimate result of the assessment on the non-resident.

Appeal from the Judgment and Order, dated the 10th March, 1953, of the former Pepsu High Court in Letters Patent Appeal No. 493 of Samvat 2005 arising out of the Judgment and Order, dated the 18th January, 1949, of the said High Court in E. As. Nos. 78-96 of Samvat 2001.

Naunit Lal, Advocate, for Appellants.

Mohan Behari Lal, Advocate, for Respondents.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal brought pursuant to a certificate under Article 133 (1) (*c*) of the Constitution from the judgment and order of the Division Bench of the erstwhile Pepsu High Court pronounced on March 10, 1953, modifying in appeal the order of the Liquidation Judge.

The facts are fully recited in the judgments of the Courts below and comparatively a brief recital will be sufficient for the purpose of this judgment. The appellant company was incorporated in 1934 under the Companies Act of the erstwhile Patiala State. It carried on the business of commission agency for dealing in forward transactions in various kinds of grain and other commodities. The respondent—firm Ganpat Rai Hira Lal of Narnaul—besides being a shareholder of the appellant company had dealings with it and entered into several forward transactions of sale and purchase of grain and other commodities. The appellant, acting as a commission agent of the respondent and its other constituents entered into several transactions of forward delivery at Hapur with Firm Pyarelal Musaddi Lal, who were carrying on commission agency business at Hapur (and will hereinafter be termed the Hapur firm). The total profits of the transactions entered into by the appellant with the Hapur firm was Rs. 48,250 on which the Hapur firm paid Rs. 14,730-8-0 as income-tax. The profits accruing on the transactions entered into on behalf of the respondent amounted to Rs. 29,275-2-6 on which the proportionate income-tax claimed to have been paid was Rs. 9,314-13-4. On May 20, 1943, the appellant was ordered to be wound up and Udmi Ram Aggarwal, a pleader of the old Patiala High Court, was appointed its liquidator. The list of contributories was settled on October 21, 1943, and the respondent was placed on that list. Though this matter was challenged in the appeal before the High Court it is no longer in controversy between the parties.

The Official Liquidator on March 18, 1944, applied under section 186 of the Patiala Companies Act, for a payment order for Rs. 12,204-12-3 against the respondent and in support of his claim he filed, with this application, copies of the respondent's account in the books of the appellant showing how the amount claimed was due from the respondent. This amount included the sum of Rs. 9,476-13-0, on account of income-tax paid by the Hapur firm for and on behalf of the respondent on the profits of the forward transactions at Hapur and the commission of the Hapur firm. The respondent raised several objections and pleaded *inter alia* that the Hapur firm with whom the appellant had entered into forward transactions had no right to demand any income-tax from the appellant as no profit had accrued to the appellant which was acting as a commission agent and "was only entitled to the commission". It was also pleaded that as on the total number of trans-

actions entered into between the respondent and the appellant there was a loss, the respondent was not liable to pay any income-tax and that the respondent had no taxable income in the year under dispute or in any other year. On May 23, 1944, the respondent filed an application in which it was submitted that the Hapur firm, who were agents of the appellant at Hapur, had retained Rs. 14,730-8-0 "which was in trust with them under section 42 of the Income-tax Act" and prayed that the Official Liquidator be directed to apply to the Income-tax authorities for a refund of the amount retained and paid by the Hapur firm, as no tax was really due on the transactions entered into by the appellant with the Hapur firm and none was payable by the respondent.

After evidence was led by both parties the payment order was made by the learned Liquidation Judge on January 18, 1949, for a sum of Rs. 8,191-0-9 which included a sum of Rs. 6,867-9-6 the proportionate amount of income-tax due on the profits accruing on the respondent's transactions. Against this order the respondent took an appeal to the Division Bench and canvassed two points : (1) that the respondent could not be settled on the list of contributories and (2) that it was not liable for the amount retained for payment of income-tax from out of profits on the transactions entered into on its behalf by the appellant with the Hapur firm and subsequently paid by the latter. The Court negatived the former contention and held that the respondent had rightly been settled on the list of contributories and upheld the latter contention and held, following a judgment of the Judicial Committee of the Ijlas-khas of Patiala in *Panna Lal Mohar Singh* v. *Aggarwal Chamber*[1], that the Official Liquidator of the appellant was not entitled to claim the amount of income-tax paid by the Hapur firm. The Judicial Committee Ijlas-khas had held:

> " Before the liability of the contributory can be fixed it must be shown that his income was such on which income was assessable. . . . . . It is not denied that the contributory was carrying on other transactions in India as it stood before partition through other person. It was therefore his entire income that was to be taken into consideration to assess his liability to income-tax".

The appellant then applied for a certificate to appeal under Article 133 (1) (*c*) which was granted in the following terms :

> " The first question is whether a decision given by one Judge of the Judicial Committee can be regarded in law as a decision of the Committee. The second is whether the principle laid down by the learned Judge of the Judicial Committee that the Aggarwal Chamber of Commerce was not entitled to recover from its clients the proportionate share of the income-tax paid by it unless it was shown that the total amount of income of the clients was assessable to income-tax, was sound.
>
> Accordingly we allow the petition and grant the certificate."

The first point has not been canvassed before us and in the view that we have taken it would be unnecessary to go into that matter. The sole point for decision is whether the respondent is liable for income-tax, which has been paid by the Hapur firm on the transactions, which were entered into by the appellant with the Hapur firm for and on behalf of the respondent? There is no finding by the High Court that the respondent had entered into any forward transactions in British India or at Hapur with any firm other than the Hapur firm and this matter was not agitated before us, nor is there any finding as to the total world income of the respondent and there is no material on the record from which it could be determined.

The appellant is a non-resident company and the respondent is a non-resident, residing at Narnaul in what was the Indian State of Patiala. The appellant entered in forward transactions on behalf of the respondent at Hapur in which there was a considerable amount of profit. The High Court has found that the Hapur firm paid Rs. 6,867-9-0 on account of income-tax which was payable on the profits made on the transactions entered into with the Hapur firm for and on behalf of the respondent. The respondent challenged its liability to pay income-tax on the ground that it was liable

> "only on his total earnings during the year under assessment and since, as is clear even from the books of the respondent, he had suffered heavy losses in his business at Narnaul, his total income was not assessable to any income-tax."

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[1] C.A. 60 of 2005 S.

The learned Liquidation Judge held the respondent liable for the amount of the income-tax by applying section 69 of the Contract Act. The Division Bench on appeal disallowed this item on the ground that it had not been shown that the "total earnings" of the respondent were taxable under the Act. Neither of the Courts below have discussed the relevant provisions of the Act, not even section 42 which was mentioned by the respondent in his application of May 23, 1944, nor have they given a finding as to the jural relationship of the Hapur firm with the respondent. The agency of the Hapur firm was not seriously disputed before us nor repudiated. The case seems to have proceeded on the basis of this agency in the Courts below. The Hapur firm was employed by the appellant for forward transaction business of the respondent who has accepted the transactions entered into as also the amount of the profit accruing on those transactions and is only disputing the amount of income-tax deducted, retained and paid on those profits. Under the law the Hapur firm would be an agent of the respondent for that part of the business of the agency as was entrusted to it and "privity of contract arises between the principal and the substitute". Section 194 of the Contract Act; *De Bussche* v. *Alt*[1].

It is now necessary to refer to the relevant provisions of the Income-tax Act in force in the assessment year 1942-43 (hereinafter termed the Act). It is not clear as to what was the signification of the words "total earnings" used by the High Court because it is not used in the Income-tax Act which uses two expressions; "total income" and "total world income" in sub-section (15) of section 2 of the Act. The definition of "total income" comprises two things: (i) the total amount of income, profits and gains referred to in section 4(1) and (ii) computation in the manner laid down in the Income-tax Act. "Total world income" includes all income, profits and gains wherever accruing or arising except income to which under the provisions of section 4 (3) the Act does not apply.

Thus in the case of the respondent who is a "non-resident" "total income" would comprise income, profits and gains received or accrued in British India or deemed to be received or to accrue in British India. Section 17 of the Act which was relied upon by the respondent's counsel occurs in Chapter III dealing with "Taxable income". It provides for the determination of tax payable in certain special cases of which the case of a non-resident is one. It provided:

"Where a person is not resident in British India and is a British subject as defined in section 27 of the British Nationality and Status Aliens Act, 1914 (4 & 5 Geo. V. Ch. 17) or a subject of a State in India or Burma, or a native of a Tribal Area, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income. . . . ."

Section 17 does not deal with or affect the rights and liabilities of persons required under the Act to make deductions of income-tax from sums payable to non-residents or the consequences of failure to make such deductions.

The very next Chapter (Chapter IV) deals with deductions which the Act requires to be made in regard to different heads of income. Section 18 provides for deduction at the source. Sub-section (3-A) of this section was as under:—

Section 18 (3-A) "Any person responsible for paying to a person not resident in British India any interest not being "interest on securities", or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate."

The proviso to this sub-section made provision for payment of monies without deduction if there was a certificate of the Income-tax Officer to that effect. Under section 18(7) of the Act a person making the deduction was required to pay the amounts so deducted to the Income-tax Authorities. In default of such deduction such person became an assessee in respect of the tax.

1. L.R. (1878) 8 Ch.D. 286, 311.

Chapter V of the Act deals with "Liability in Special Cases" which includes agents. Section 40(2) dealing with the case of trustees or agents of a person non-resident in British India; provided:

> *Section* 40 (2): "Where the trustee or agent of any person not resident in British India and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a beneficiary) is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax, if not levied on the beneficiary direct, may be levied upon and recovered from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly."

Thus under this section which is essentially a machinery and an enabling section the tax to be realised from a non-resident could be levied upon the agent in the same manner as it could have been leviable upon and recoverable from a non-resident. Section 42 (1) of the Act provided:

> "All income, profits or gains accruing or arising, whether directly or indirectlt, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income."

In proviso 2 to this sub-section any such agent who apprehended that he might be taxed as such agent could retain out of any money payable to such non-resident a sum equal to the estimated liability under the sub-section and in the event of any disagreement between the non-resident and such agent a certificate could be obtained from the Income-tax Officer as to the amount to be retained which shows that the Act had a provision for the determination of the question. As was observed by Viscount Cave in *Williams* v. *Singer*[1]:

> "The fact is that, if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found."

See also *Archer Shee* v. *Baker*[2], *Executors of Estate of Dubash* v. *Commissioner of Income-tax*[3].

This has rightly been stated to be the underlying principle of the deduction under sections 40, 41 and 42. Section 48 of the Act deals with Refunds and if the respondent thought that it was not liable to the payment of any tax it could apply to the Income-tax Officer for refund.

Thus the Hapur firm being an agent could be held liable under sections 40 (2) and 42 (1) of the Act as an assessee for income-tax on the profits made on the respondent's transactions at Hapur and was therefore entitled under the proviso to section 42 (1) to retain the estimated amount of income-tax payable on the amount of the respondent's profits which in this case was deducted, retained and actually paid. This fact has not been challenged before us. The ground on which this liability is attacked is that the total world income of the respondent was not taxable and therefore, on the profits made on the Hapur transactions, the British Indian Tax Authorities could not levy any tax. This contention disregards the provisions of and liability arising under sections 40 (2) and 42 (1) and the proviso thereto. It also is contrary to the principle of taxing statutes that the protfis are "taxed where they are found." In this case they were in the hands of the Hapur firm which was in receipt and control of the income. The agent at Hapur, having lawfully and properly paid the tax under the Act that amount has been rightly deducted from the profits accruing on the Hapur transactions.

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1. (1920) 7 T.C. 387, 411 (H.L.).
2. (1927) 11 T.C. 749, 770 (H.L.).
3. (1951) 19 I.T.R. 182, 189 : (1951) S.C.J. 165 : (1951) 1 M.L.J. 328 (S.C.).

The Judgment of the Judicial Committee of the Ijlas-i-khas on which the High Court has based its decision suffers from the infirmity that it ignores both the provisions of and principle underlying sections 40 (2) and 42 (1) of the Act and the proviso thereto relating to the liability of an agent under the Act and the law of Agency relating to employing of sub-agents by agents. If the Hapur firm rightly paid the tax on the profits, the respondent cannot be allowed to challenge the amount on the ground that his total world income was not taxable and he was entitled to his profits without deductions. That is a question which has to be agitated by the non-resident assessee at the time of his assessment. Those persons who are bound under the Act to make deduction at the time of payment of any income, profits or gains are not concerned with the ultimate result of the assessment. The scheme of the Act is that deductions are required to be made out of "salaries", "interest on securities" and other heads of "income, profits and gains" and adjustments are made finally at the time of assessment. Whether in the ultimate result the amount of tax deducted or any lesser or bigger amount would be payable as income-tax in accordance with the law in force would not affect the rights, liabilities and powers of a person under section 18 or of the agent under sections 40 (2) and 42 (1). As to what would be the effect and result of the application of section 17 if and when any appropriate proceedings are taken is not a matter which arises in this appeal between the appellant and the respondent nor can that matter be adjudicated upon in these proceedings. That is a matter which would be entirely between the respondent and the Income-tax authorities seized of the assessment.

Our attention was drawn to two cases; *Commissioner of Income-tax* v. *Currimbhoy Ebrahim & Sons*[1]. In that case the assessee company had been treated as an agent of the Nizam of Hyderabad who had lent to the assessee company a sum of Rs. 50 lakhs. The assessee company had paid in the assessment year a sum of Rs. 3 lakhs on account of interest and it was held that the interest earned by the Nizam did not accrue or arise to the Nizam through or from any business connection with the assessee company in British India or from any property within British India and therefore section 42 was not applicable. No question of "business connection" was raised in the Court below and the argument there proceeded on the basis that the respondent was not liable for this amount on account of income-tax because the "entire income" was not assessable to income-tax. The argument of isolated transactions based in the *Anglo-French Textile Co., Ltd.* v. *Commissioner of Income-tax, Madras*[2] is not available to the respondent nor was the foundation for any such argument laid in the Courts below or raised in the statement of the case filed by the respondent in this Court. Another case on which reliance was placed is *Greenwood* v. *F. L. Smidth & Company*[3]. That was a case of a Danish firm resident in Copenhagan. It manufactured and dealt with cement making machinery which it exported to other countries. It had an office in London in charge of a qualified engineer who received enquiries for machinery such as the firm could supply, sent to Denmark particulars of the work which the machinery was required to do and when the machinery was supplied he was available to give English purchaser the benefit of his experience in erecting it. The contracts between the firm and their customers were made in Copenhagan and the goods were shipped F.O.B., Copenhagan. It was held in that case that the firm did not exercise a trade within the United Kingdom within the meaning of Schedule D. of section 2 of the Income-tax Act, 1853 and was therefore not assessable to income-tax. This decision is not relevant to the case now before us as the facts were different and the decision was under a different statute.

In our opinion the Judicial Committee of Ijlas-i-khas was in error in holding that before fixing the liability of a contributory to tax paid by an agent in British India for and on behalf of the non-resident contributory, his liability to pay tax on his "entire income" really total world income had to be established. There-

1. (1935) 3 I.T.R. 395 : 70 M.L.J. 247 : L.R. 63 I.A. 1 (P.C.).
2. (1953) S.C.R. 454 : (1953) S.C.J. 91 : (1953) 1 M.L.J. 381 (S.C.).
3. L.R. 1922) 1 A.C. 417.

fore the finding of the High Court that the Liquidator cannot claim from the respondent the amount of tax paid by the Hapur firm on transactions entered into by the appellant for and on behalf of the respondent unless it was shown that his total world income was taxable is unsustainable. As between the parties the tax paid by the agent had to be taken into account irrespective of the ultimate result of the assessment on the non-resident.

In the result this appeal is allowed and the Judgment and Order of the Division Bench of the Pepsu High Court set aside and the order of the learned Liquidation Judge restored but in the circumstances of this case the parties will bear their own costs in this Court and in the Courts below.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

Sardar Syedna Taher Saifuddin Saheb .. *Appellant**

v.

State of Bombay .. *Respondent.*

Practice—Suit for declaration that order of excommunication of plaintiff was invalid—Finding on—Preliminary issue that Bombay Prevention of Excommunication Act (*XLII of* 1949) *was valid and retrospective—Appeal against decision—State of Bombay party to suit and appeal—Death of plaintiff-respondent—Suit abates.*

Constitution of India (1950), *Articles* 132 *and* 133*—Appeal against finding on preliminary issue—Unsustainable.*

In a suit for declaration that the order of excommunication of the plaintiff was invalid on the preliminary issue there was a finding that the Bombay Prevention of Excommunication Act was valid and retrospective and that was confirmed on appeal by the High Court. Pending an appeal by the defendant to the Supreme Court against that decision the plaintiff died. The State of Bombay was a party as the *vires* of the Act was questioned.

Held : The appeal cannot proceed as the suit has abated. Moreover the appeal to the Supreme Court is not competent under Article 132 as there was only a finding on a preliminary issue and there was no decree or final order.

The fact that a certificate had been given by the High Court under Article 132 does not alter the position. Under Article 133 also an appeal lies only against judgments, decrees or final orders and no certificate could be granted in respect of an interlocutory finding.

The defendant-appellant cannot therefore continue the appeal against the State of Bombay.

Appeal from the Judgment and Order, dated the 20th August, 1952, of the Bombay High Court in Appeal No. 43 of 1952 arising out of Original Suit No. 1262 of 1949.

N. C. Chatterjee, Senior Advocate (*J. B. Dadachanji* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellant.

Porus A. Mehta and *R. H. Dhebar*, Advocates, for Respondent.

The Order of the Court was pronounced by

Venkatarama Aiyar, J.—On 28th February, 1934, the appellant who is the religious head of the Dawoodi Vohra Community, passed an order excommunicating one Tyebhai Moosaji Koicha. On 17th July, 1920, the appellant had excommunicated two persons, Tahirbhai and Hasan Ali, and the validity of the order was questioned in a suit instituted in the Court of the Subordinate Judge, Barhampur. The litigation went up to the Privy Council, which held that the appellant as the religious head had the power to excommunicate a member of the community, but that that power could only be exercised after observing the requisite formalities, and as in that case that had not been done, the order of excommunication was invalid. Vide *Hasan Ali* v. *Mansoor Ali*[1].

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*Civil Appeal No. 99 of 1954. 27th November, 1957.

1. A.I.R. 1948 P.C. 66 : L.R. 75 I.A. 1 : I.L.R. (1948) Nag. 179 (P.C.).

Apprehending that the order dated 28th February, 1934, was open to challenge under the decision in *Hasan Ali* v. *Mansoor Ali*[1] on the ground that it had not complied with the requiste formalities, the appellant started fresh proceedings, and on 28th April, 1948, passed another order of excommunication. Thereupon, Tyebhai Moosaji filed the present suit for a declaration that both the orders of excommunication dated 28th February, 1934, and 28th April, 1948, were invalid and for other consequential reliefs.

While this action was pending, the Legislature of the Proivnce of Bombay passed the Bombay Prevention of Excommunication Act (Bombay Act XLII of 1949) prohibiting excommunication, and that came into force on 1st November, 1949. The plaintiff contended that the effect of this legislation was to render the orders of excommunication illegal. The answer of the appellant to this contention was, firstly, that the Act had no retrospective operation; and that, in consequence, the orders passed on 28th February, 1934, and 28th April, 1948, were valid, and remained unaffected by it; and secondly, that the Act was itself unconstitutional, because the subject-matter of the impugned legislation was not covered by any of the entries in List II or III of Seventh Schedule to the Government of India Act, 1935, and the Legislature of the Province of Bombay had no competence to enact the law. After the coming into force of the Constitution, the contention was also raised that the right of the defendant to excommunicate members of the community was protected by Articles 25 and 26 of the Constitution, and that the impugned Act was void as infringing the same.

The issues in the action were then settled, and issue No. 19, which was raised with reference to the contentions, was as follows:

> "Whether the orders of excommunication made in 1934 and/or 1948 are invalid by reason of the provisions of the Bombay Prevention of Excommunication Act of 1949?"

This was tried as a preliminary issue, and as it raised the question of the *vires* of a statute, the State of Bombay was impleaded as the second defendant in the suit. Shah, J., who tried this issue, held that the impugned Act was retrospective in its operation, that it was within the competence of the Provincial Legislature, and further that it did not offend Articles 25 and 26 of the Constitution.

Against this finding, the present appellant preferred an appeal to a Bench of the Bombay High Court, and that was heard by Chagla, C.J., and Bhagwati, J., who held that under the Act, excommunication meant the condition of being expelled, that it was a continuous state during which the person excommunicated was deprived of his rights and privileges, and that, therefore, the Act would operate to protect those rights from the date it came into operation. They further held that the Act was within the competence of the Legislature, and they also repelled the contention that it infringed the rights guranteed under Articles 25 and 26 of the Constitution. In the result, they concurred in the decision of Shah, J., and dismissed the appeal but granted a certificate to appeal to this Court under Articles 132 and 133 of the Constitution. Hence this appeal.

Pending the appeal, the plaintiff died on March 11, 1953, and his daughter applied on May 22, 1953, to be substituted in his place. But eventually she did not press the application, and that was dismissed on October 5, 1953. In this Court by an order dated November 21, 1955, the cause title was amended by deleting the name of the plaintiff. Thus, the only parties who are now before the Court are the defendant and the State of Bombay.

The question is whether in the events which have happened, the appeal can proceed. We are of opinion that it cannot. It should be remembered in this connection that no decree had been passed in the suit. Only a finding has been given on a preliminary point, and it is that finding that has been the subject of appeal to the High Court of Bombay and thereafter to this Court. There are other issues still to be tried, and the action is thus undetermined. Now, the claim with which the plaintiff came to Court was that he was wrongly excommunicated, and that

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1. A.I.R. 1948 P.C. 66 : L.R. 75 I.A. 1 : I.L.R. (1948) Nag. 179 (P.C.).

was an action personal to him. On the principle, *actio personalis moritur cum persona*, when he died the suit should abate. As a matter of fact, his legal representative applied to be brought on record, but the application was not pressed. The result is that the suit has abated. This would ordinarily entail the dismissal of the appeal.

Mr. N. C. Chatterjee for the appellant argues that as the State of Bombay had been impleaded as a party, and that as the decision on the question of the *vires* of the Act had been given in its presence, the appellant is entitled to continue the appeal against the State without reference to the plaintiff and seek the decision of this Court on the validity of the Act; and relies on the decision of the Federal Court in *The United Provinces* v. *Mst. Atiqa Begum and others*[1]. There, a suit was filed by a landlord for recovery of rent. While it was pending in appeal, an Act was passed by the Legislature of the United Provinces validating certain Government notifications requiring the landlords to give to the tenants remission of rent. The landlord contended that the Act was *ultra vires*, and a Full Bench of the Allahabad High Court, for whose opinion the question was referred, agreed with this contention. Thereafter, the Government of the United Provinces got itself impleaded as a party to the appeal of the landlord, and a decision having been given therein in accordance with the opinion of the Full Bench, it preferred an appeal to the Federal Court on a certificate granted under section 205 of the Government of India Act, 1935, and contended that the impugned Act was valid. The Judgment-debtor himself did not file any appeal. The question was whether the Government was entitled to file the appeal when the party had not chosen to contest the decree. It was held by the Federal Court that the scope of section 205 of the Government of India Act was wider than that of section 96 of the Civil Procedure Code, and that the Government was entitled to file the appeal for getting a decision on the validity of the Act, notwithstanding that it had no interest in the claim in the suit. This ruling has, in our opinion, no application to the facts of the present case. Here, the action itself has abated, and there can be no question of an appeal in relation thereto, as an appeal is only a continuation of the suit, and there can be no question of continuing what does not exist.

But apart from this, there is another formidable obstacle in the way of the appellant. Under Article 132, an appeal lies to this Court only against judgments decrees or final orders. That was also the position under section 205 of the Government of India Act. Now, the order appealed against is only a decision on one of the issues, and it does not dispose of the suit. In *The United Provinces* v. *Mst. Atiqua Begum and others*[1], there was a decree, and the requirements of section 205 were satisfied. Here, there is only a finding on a preliminary issue, and there is no decree or final order. The *Explanation* to Article 132 provides that:

> "For the purposes of this Article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case."

Applying this test, even if we accept the contention of the appellant that the impugned Act is bad, that would not finally dispose of the suit, as there are other issues, which have to be tried. We are clearly of opinion that the appeal is not competent under Article 132, and the fact that a certificate has been given does not alter the position. It is said that the certificate is also under Article 133, but under that article also, an appeal lies only against judgments, decrees or final orders, and no certificate could be granted in respect of an interlocutory finding.

The result is that this appeal must be dismissed, as not maintainable. We should add by way of abundant caution that as we express no opinion on the correctness of the decision under appeal, this order will not preclude the appellant from claiming such rights as he may have, in appropriate proceedings which he may take. In the circumstances, there will be no order as to costs.

Appeal dismissed.

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1 (1939-1940) F.L.J. (F.C.) 97 : (1941) 1 M.L.J. (Supp.) 65.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, P. GOVINDA MENON AND J. L. KAPUR, JJ.

Subramania Goundan .. *Appellant**

v.

The State of Madras .. *Respondent.*

Evidence Act (I of 1872), section 133—Retracted confession—Extent and nature of corroboration essential to base a conviction on.

As a matter of prudence and caution a retracted confession cannot be made solely the basis of conviction unless the same is corroborated, but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.

In the case of an approver or accomplice it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition was voluntary and true or not and it is with that object that corroboration is sought for. In the case of the person confessing who has resiled from the statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue.

Appeal by Special Leave from the Judgment and Order, dated the 12th February, 1957, of the Madras High Court in Criminal Appeal No. 728 of 1956 and Referred Trial No. 144 of 1956 arising out of the Judgment and Order, dated the 23rd October, 1956, of the Court of the Additional Sessions Judge of the Coimbatore Division, in S.C. Nos. 120 and 135 of 1956.

H. J. Umrigar and *T. S. Venkataraman*, Advocates, for Appellant.

P. Rama Reddy and *T. M. Sen*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Govinda Menon, J.—Before the Additional Judge of the Court of Sessions of Coimbatore Division there were four accused, of whom the first accused Subramania Goundan has now appealed to this Court against the confirmation by the High Court of Madras of the conviction and sentence by the trial Court, by which, on charges Nos. 1 and 2, he was sentenced to death, and also sentenced to rigorous imprisonment for two years on charge No. 3. Special Leave to appeal was granted by order of this Court, dated the 6th of May, 1957. Along with the appellant were tried three others, of whom the second accused (Marappa Goundan) was his father. The third accused (Karuppa) was the grandson of the second accused's paternal uncle, while the fourth accused (Iyyavu) was an agnate in the fourth degree of the second accused. It is thus seen that all the accused were related to each other.

The learned Sessions Judge framed four charges of which the first was against the appellant, that he on June 6, 1956, at night in the village of Vengakalpalayam, committed the murder of Marappa Goundan by cutting him with an aruval ; while the second charge was that at about the same time and place and in the course of the same transaction, he committed the murder of Muthu Goundan by stabbing him with a spear. The third count of the charge was against the first and the second accused that they conjointly committed the offence of attempt to murder by stabbing one Munia Goundan with a spear and knife, and the last count of the charge was against accused Nos. 3 and 4 that they abetted the commission of the offence of attempt to murder of Munia Goundan by being present on the scene. The learned Sessions Judge acquitted accused Nos. 2, 3 and 4, but convicted and sentenced the appellant before us in the manner stated above.

* Criminal Appeal No. 127 of 1957. 17th September, 1957.

The village, where the offences were committed, was faction-ridden in which the appellant, his father and others took one side, whereas the two deceased individuals, along with Munia Goundan and others, formed the leaders of the rival faction. It was also stated that the appellant's father was the leading man of the village, having been assigned that dignity by the consent of the villagers.

The prosecution case is that the dignity of the appellant's family had been offended by certain actions of the rival party and it was apprehended by the appellant's father that his prestige and influence, as the chief-man of the village, were being gradually undermined and usurped by the rival group. About three days prior to the occurrence, which took place on the night between the 6th and the 7th of June, 1956, Munia Goundan is said to have stated to the hearing of the appellant that he (Munia Goundan) would wipe out the appellant's father and his partisans, and if that were not possible, in a spirit of humiliation, Munia Goundan would shave off his moustache. It is further alleged that the two deceased individuals also proclaimed words to that effect.

Angered at this threat of extermination of his family and inflamed by the enmity due to the faction that had already existed, the appellant, according to the prosecution, having armed himself with an aruval (a sickle) a spear and a knife left his house on the night of the 6th and 7th June, 1956, proceeded to a place known as *Chettithottam* where the deceased Marappa Goundan was sleeping in his field-shed, and cut him on the neck with the aruval, and inflicted other injuries on him before leaving the place. Thereafter while on his way to the house of Munia Goundan to do away with him, the appellant met the deceased Muthu Goundan who was coming in the opposite direction and thinking that Muthu Goundan would catch him, inflicted a stab wound on Muthu Goundan. After this the appellant went to the house of Munia Goundan (P.W. 5) and stabbed him also. Not being content with committing these crimes, he set fire to the shed of Sennimalai Goundan (P.W. 4—who was also a partisan of the rival faction) which lay at a distance about four furlongs from the village. Thereafter the appellant returned to his own garden and lay down.

Karuppa Goundan (P.W. 1) hearing cries and noise from the direction of the house of Munia Goundan, ran towards that place, followed by Sennimalai Goundan (P.W. 4) who similarly heard the same cries. They found Munia Goundan (P.W. 5) with injuries on him and also saw the shed of Sennimalai Goundan (P.W. 4) aflame. At this P.W. 4 and P.W. 5 proceeded to the burning shed and on the way saw Natarajan (P.W. 10), the son of the deceaased Marappa Goundan, weeping and lamenting in his field. Reaching the place wherefrom P.W. 10 was wailing, P.W. 4 and P.W. 5 saw Marappa Goundan lying dead on a cot in the shed with injuries. It is in evidence that the witnesses then saw the shed of P.W. 4 completely burnt down and after that Karuppa Goundan and Sennimalai Goundan went to the house of the Village Munsif who was living about four miles away from the village and gave a report about the occurrence at about 5 A.M. on 7th June, 1956 and which is on record as Exhibit P-1. Information reached the Sub-Inspector of Police of Avanashi (P.W. 17) at 8-30 A.M. who reached the place of occurrence at 11 A.M. Investigation was then started, the details of which it is unnecessary to mention. At about 12 noon near a temple in the village finding the appellant there, the Sub-Inspector of Police arrested him after which the appellant made a statement, the admissible portions of which are marked as Exhibit P-13. From the appellant material objects Nos. 10 and 11, a blood-stained drawer and a baniyan respectively worn by him were seized and the appellant thereafter took the Police Officer to his garden and took out M. O. 12, a blood-stained bed-sheet from a rafter in the garden shed which, according to the prosecution, was used by the appellant for wrapping himself up after he lay down in his shed subsequent to the commission of the crime. Statements were taken by the Sub-Inspector from a number of persons, including Natarajan (P.W. 10), son of Marappa Goundan, Nachimuthu Goundan (P.W. 11), son of Muthu Goundan, Munia Goundan (P.W. 5) and others. We do not think it necessary to describe the details of the investigation and the examination of witnesses regarding the accusations against the acquitted persons.

On June 9, 1956, at about 3-50 P.M., the appellant was produced before Sri P. I. Veeraswami, Sub-Magistrate (P.W.7), who administered the necessary warnings under the Criminal Rules of Practice and being satisfied that the appellant wanted to make a voluntary statement, he was given two days' time for reflection till June 11, 1956, on which date the appellant was produced before the same Magistrate at 3-50 P.M. The same warnings were again administered to him and the Magistrate was satisfied that the statement about to be made was a voluntary one. Thereafter it was recorded in the appellant's own words, read over to him and acknowledged by him to be correct. This statement in which the appellant confessed to having committed the murder of Marappa Goundan and Muthu Goundan and also inflicted injuries on Munia Goundan on the night in question, is exhibited as Exhibit P-3/A.

In order to prove the case against the appellant the main reliance on the side of the prosecution was on Natarajan (P.W. 10), the eye-witness to the attack on his father Marappa Goundan, and with regard to the murder of Muthu Goundan, the case rested on the testimony of Nachimuthu Goundan (P.W. 11), son of Muthu Goundan, who is said to have told the witness (P.W. 12) that the appellant had stabbed Muthu with a spear. Subbanna Goundan (P.W. 12), a neighbour of Muthu Goundan, also spoke to the fact that he heard Muthu Goundan saying that the appellant had stabbed him with a spear. The assault on Munia Goundan (P.W. 5) is spoken to by himself. In addition to this evidence, the prosecution rested its case on the confession of the appellant. Before the learned Sessions Judge the appellant denied the offence and retracted the confession made by him on the ground that the Sub-Inspector and the Circle Inspector of Police threatened to implicate the appellant's father and five others in the crime if he did not confess and that was the reason why he made a false confession.

The learned Sessions Judge accepted the testimony of Natarajan (P.W. 10), Nachimuthu Goundan (P.W. 11) and Subbanna Goundan (P.W. 12) with regard to the murders and also that of Munia Goundan (P.W. 5) and Komaraswami Goundan (P.W. 6) with regard to the attack on Munia Goundan. He also held that the confession, Exhibit P-3/A, was voluntary and true and on the footing of the oral evidence, corroborated amply by the confession, the appellant was convicted and sentenced. In the High Court Somasundaram, J., who delivered the judgment of the Court, was not inclined to place reliance on the oral testimony of P.W. 5, P.W. 10 and P.W. 11. The learned Judge was of the opinion that it was not safe to act on the evidence of Natarajan (P.W. 10) and convict the appellant of the offence of murder of Marappa Goundan. The High Court did not accept the evidence of Nachimuthu Goundan (P.W. 11) and Subbanna Goundan (P.W. 12). In the same strain the judgment of the High Court states that it is not safe to act on the evidence of Munia Goundan (P.W. 5) and (P.W. 6) Komaraswami Goundan. The conclusion was that the oral evidence did not reach that standard of proof necessary for reliance to sustain a conviction, but the learned Judge upheld the conviction on the ground that as the confession was voluntary and true, it can be believed though the same was retracted. Opinion was also expressed that the confession was corroborated by the recovery of M.O. 12, as a result of the statement made by the appellant which contained human-blood for which there was no explanation whatsoever. Corroboration was also afforded by the existence of human blood on M.Os. 10 and 11. The question, therefore, before us is whether the High Court erred in law in agreeing with the trial Court regarding the guilt of the appellant.

Had the High Court come to the conclusion that the evidence of P.Ws. 5, 10 and 11 can be accepted in order to sustain the conviction of the appellant, the question would have been simpler of solution, and alternatively were this Court inclined to appraise the credibility or otherwise of their testimony, whether a different conclusion would have been arrived at, is unnecessary to speculate. On a perusal of the evidence of these witnesses, it cannot be said that their testimony is such as should be relegated to the realm of disbelief. Even so, we have decided to proceed on the footing, that the testimony of the important prosecution witnesses

would not be sufficient for a conclusion that the appellant is guilty beyond reasonable doubt.

The ultimate approach, therefore, to the question should be whether the confession, Exhibit P-3/A, is entitled to credence and be acted upon. The learned counsel for the appellant, Sri Umrigar, was at pains to show, firstly, that the confession was not voluntary; secondly, it is not true and lastly, that even if these two tests are answered in the affirmative so far as the prosecution is concerned, it would be very unsafe to act on this retracted confession which, according to him, was resiled from as early as an opportunity occurred. Dealing with the first question, he pointed out that the appellant was produced at 3-45 P.M., on June 9, 1956, before the Sub-Magistrate in the Court hall which was cleared of all police officials, and the Jail warder alone was placed in-charge; thereafter the Sub-Magistrate gave the necessary warnings and enough time was given for reflection. The criticism levelled by the appellant's counsel is that despite these beneficient actions, still the influence of the police on the appellant still remained and that even at the time when the confession was given, it cannot be said that the appellant was free from police pressure. Our attention was invited to passages in cross-examination of P.W. 7 where he had stated that on both the occasions when the appellant was produced for recording of the confession, the Police Constable in guard at the Sub-Jail was in charge and further that there is a gate way between the Police Station and the Court, and that gate way is the approach to the Sub-Jail. From these circumstances inference is sought to be drawn that though during the relevant periods the incarceration of the appellant was in a Sub-Jail, still he was under police custody and influence and, there was no clearance of the supervening police control on him, in order to make his mind free from all such influence. We have carefully gone through the questions put by the Magistrate, not only on June 9, 1956, when the appellant was given time for reflection, but also on those on June 11, 1956; when he gave the confessional statement, and we are satisfied that nothing could be said against the procedure followed. The learned Magistrate has clearly conformed to the procedure prescribed by sections 164 and 364 of the Criminal Procedure Code, as well as to the directions laid down in the Madras Criminal Rules of Practice as a preliminary to the recording of the confession. The meagre cross-examination of the Sub-Magistrate has not brought out any material circumstances which would, in any way, detract from the satisfactory way in which he has performed his official duty. In the endorsement at the foot of the confessional statement the Sub-Magistrate (P.W. 7) says that he had explained to the appellant that he (the appellant) was not bound to make a confession and if he does so, it may be used as evidence against him ; and the endorsement further goes on to add that the Sub-Magistrate believed that the confession was voluntarily made. The next remark is that it was taken in his presence and hearing and read over to the confessor who admitted it to be correct. But it is urged against the voluntary nature of the confession, that an inducement was given by the Magistrate by the manner in which the questions were put. One of the questions was 'Why do you want to give a statement?' and the answer given was 'It is suspected that those who have committed murder are others. To prove that it is I who have stabbed, I am giving the statement.' The above was the question put and the answer given on June 9, 1956. On June 11, 1956, the question and the answer were as follows :

"*Q*. For what purpose are you going to make a statement ?

A. Others will be implicated in the case for murder, I alone have committed murder. I am going to give the statement to that effect."

When he resiled from the confession in the Sessions Court, the appellant stated that the Sub-Inspector and the Circle Inspector went to him in Sub-Jail and threatened to implicate his father, accused No. 2 in the lower Court, and five others unless he confessed. Therefore, it was on this account that the statement Exhibit P-3/A was made before the Magistrate which the accused alleged was neither true, nor voluntary. The argument of the learned counsel is that in order to save his father and some others, the appellant implicated himself and confessed falsely to an act which he did not commit. Criticism has been levelled against the mode

and manner in which the question was put as directly inducing the appellant to immolate himself and thereby save his kith and kin. We are asked to say that the appellant, being an emotional youngman of noble sentiments and spirit, did not desire to have his father implicated in a crime of this sort and what may be ascribed as a filial obligation was performed in trying to get release of his father from the enmeshes of the police. Such an argument, we are afraid, cannot carry any conviction. The form of the question is prescribed by the Criminal Rules of Practice and if the officer before whom the confession is made, fails to put it, then his failure will be criticised as blameworthy. We do not feel that any nefarious object existed in putting a perfectly innocuous and obligatory question to the appellant asking him "Why he wants to make a statement?" Further, P.W. 17, the Investigating Sub-Inspector, has clearly denied the alleged inducement by the police that if he did not confess, others, including his father, would be implicated in the case. It is, therefore, difficult to conclude that there was any kind of inducement or threat as a result of which an involuntary confession was made.

A complaint is made by the learned counsel that before the Committing Magistrate no question under section 342, Criminal Procedure Code was put to the appellant with regard to the confession and therefore, he had no opportunity to put forward his complaint about the confession until the case came before the Sessions Court. No doubt a scrutiny of the statement of the accused before the Sub-Magistrate does not reveal any specific questions as having been put to him about the confession, but the fact remains that the confession was exhibited before the Committing Court and the contents were known to the appellant then and there. Under section 207-A, sub-clause (3) of the Criminal Procedure Code, even at the commencement of the inquiry into a case triable by a Sessions Court the Committing Magistrate is enjoined, when the accused is brought before him, to satisfy himself that the documents mentioned in section 173 have been furnished to the accused and if it is found that they have not so far been furnished, it is the duty of the Magistrate to cause the same to be furnished. Section 173, sub-clause (4) makes it obligatory upon the Police to furnish the accused free of cost with a copy of the police report, the first information report under section 154 and all other documents on which the prosecution propose to rely, including statements and confessions if any recorded under section 164. The result, therefore, is that even before the commencement of the committal proceedings the appellant had been provided with the copy of the confessional statement sought to be relied upon for justifying a *prima facie* case against him. We do not think, granting that the confession was not placed in the fore-front as a piece of evidence against the accused in the Committing Court, such a default if it is one, would in any way show that the confession was involuntary.

The second aspect of the learned counsel's contention is that the confession is not true. In Criminal Appeals Nos. 22 and 23 of 1957, dated April 10, 1957, (*Sarwan Singh and Harbans Singh* v. *The State of Punjab*)[1] this Court expressed the opinion that for the purpose of finding out whether a confession is true, it would be necessary to examine the same and compare it with the rest of the prosecution evidence and the probabilities of the case, and Mr. Umrigar relying on these observations urges that on a comparison of the confession with the other parts of the prosecution evidence, the irresistible conclusion should follow that on the face of it the confessional statement is unture. The material portions of the confessional document concerning the actual crime are to the following effect:

"So on Wednesday night at about 11 O'clock, I took aruval, spear and knife sharp on both sides and went to Chetty Thottam, near our garden. Marappa Goundan, then was lying on the cot in his shed and sleeping. I cut him with aruval on the neck. While coming from there, to the house of Muniappa Goundan in our village, Muthu Goundan came opposite to me in our village street. Thinking that he came to catch me I stabbed him. The aruval fell there itself.

Then, I went to Muniappa Goundan's house, and stabbed Muniappa Goundan.

Afterwards, I set fire to the shed of Sennimalai Goundan at a distance of four furlongs to our village. Then I came to our garden and lay."

1. Since reported in 1957 S.C.J. 699: (1957) M.L.J. (Crl.) 672.

From this, according to the defence counsel, it is seen that only one cut was inflicted with an arival on the neck of Marappa Goundan and a single stab was given to Muthu Goundan. Similarly Munia Goundan was only stabbed once, but in Exhibit P-4 the *post-mortem* certificate on the body of Marappa Goundan there are as many as thirteen injuries of which the neck injuries were 4, 5 and 6, the others being on other parts of the body. It is, therefore, urged that the unquestionable fact of the existence of a number of injuries on Marappa belies the truth of the confession, in that only one cut was given on the neck. Similarly the confession does not make any mention of the presence of any one else when Munia Goundan was stabbed, though both P.W. 5 and P.W. 6 have deposed that there were three persons who were coming northward from the shed of Marappa Goundan at the time P.W. 5 was stabbed. The statement made by P.W. 5 (Exhibit D-2) before the Medical Officer on June 8, 1956, was also to the effect that more persons than one were involved in the attack on him. The confession also does not make any reference to the recovery of the incriminating articles such as M.O 12 as a result of a statement made by the appellant to the police officer. From these circumstances we are asked to say that the confession cannot be true. Mr. Umrigar urges that the learned Judges of the High Court have not paid sufficient attention to this method of examining how far a confession is true by comparing it with the other evidence in the case in accordance with the test laid down by this Court. Even in the absence of such comparison in the judgment of the High Court we do not think that on that ground it can be predicated that the appellant made an untrue statement voluntarily. After all the absence of elaborate details in a confession cannot brand it as false. There is no statement in the confession which is contrary to the oral evidence though the details put forward when the witnesses were examined in Court do not appear *in extenso* in the confession and for that reason we are not prepared to say that the confession is untrue.

The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the Court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being *Kesava Pillai alias Koralan and another and Kesava Pillai alias Thillai Kannu Pillai*[1], that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being '*Balbir Singh v. State of Punjab*[2], but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under section 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, *Illustration* (*b*) to section 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own

1. (1929) 57 M.L.J. 681 : I.L.R. 53 Mad. 160. 2. A.I.R. 1957 S.C. 216.

showing he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement which was the result of remorse, repentence and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession, are untrue.

Applying this test to the present case, we are of the opinion that when the appellant has given no satisfactory explanation for the presence of human-blood on material objects Nos. 10, 11 and 12, it follows that the blood of the murdered was on these material objects. The reasons for retraction are also false. A criticism is levelled that the Chemical Examiner's report does not show the extent of blood on M.O. No. 12, the bed-sheet, in which the appellant wrapped himself after the offence. All that the document states is that among other items it is also stained with human-blood, but Mr. Umrigar argues that this description only shows that there would have been only a speck or a spot of blood on the bed-sheet, for according to him, as a matter of fact, there should have been a large quantity of blood on the hands of the appellant if he had, without washing, used a bed-sheet, thereafter large patches of blood are likely to be present on the bed-sheet. If that is so, the mere fact that the presence of blood is described as stains would show that the prosecution case cannot be true : We do not feel inclined to put such a restricted meaning on the word 'stain'. 'Stained with human blood' is an expression commonly found in Chemical Examiner's reports and it does not necessarily refer to specks of blood alone. We do not think that any inference can be drawn from the use of the word 'stain' in the Chemical Examiner's report, that there was not sufficient blood on the bed-sheet. The appellant has given no explanation as to how blood came to be present on material objects Nos. 10 to 12. Agreeing with the High Court that this is corroboration of the confession made by the appellant, we are of the opinion that the confession can be acted upon. If that is so, the appellant's guilt has been proved beyond reasonable doubt.

The appeal is dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, P. GOVINDA MENON AND J. L. KAPUR, JJ.

State of Madras .. *Appellant**

v.

A. Vaidyanatha Iyer .. *Respondent.*

Prevention of Corruption Act (II of 1947), section 4—Person proved to have accepted gratification—Presumption that it was received by way of illegal gratification.

Constitution of India (1950), Article 136—Appeal by special leave—Interference with acquittal.

In Article 136 of the Constitution of India the use of the words " Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India" show that in criminal matters no distinction can be made as a matter of construction between a judgment of

* Criminal Appeal No. 5 of 1957. 26th September, 1957.

conviction or acquittal. The Supreme Court will not readily interfere with finding of fact given by the High Court but if the High Court acts perversely or otherwise improperly interference will be called for.

Where in a case under the Prevention of Corruption Act (II of 1947) it is proved that a gratification has been accepted by the accused, then the presumption shall at once arise under section 4 of the Act that he accepted the gratification as a motive or reward such as is mentioned in section 161 of the Penal Code. This introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused.

Appeal by Special Leave from the Judgment and Order, dated the 6th September, 1955, of the Madras High Court in Criminal Appeal No. 498 of 1954 and Criminal Revision Case No. 257 of 1955, arising out of the Judgment and Order, dated the 12th July, 1954, of the Special Judge, Coimbatore in C.C. No. 1 of 1952.

H. J. Umrigar, *H. R. Khanna* and *R. H. Dhebar*, Advocates, for Appellant.

K. S. Krishnaswamy Iyengar, Senior Advocate (*Sardar Bahadur*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by the State of Madras from the judgment and order of the High Court of Madras reversing the judgment of the Special Judge of Coimbatore and thereby acquitting the respondent who had been convicted of an offence under section 161, Indian Penal Code and sentenced to six months' simple imprisonment.

The respondent, Vaidyanatha Iyer, was at all material times the Income-tax Officer of Coimbatore and it is not disputed that he was there in the beginning of June, 1951. According to the prosecution the respondent in the end of September, 1951, demanded from K. S. Narayana Iyer, (hereinafter referred to as the complainant) who is a proprietor of a "Coffee Hotel" called Nehru Cafe in Coimbatore with another similar hotel at Bhavanisagar, a bribe of Rs. 1,000.

The complainant had been assessed to income-tax all along since 1942. During the course of assessment for the year 1950-51 it was discovered that he had failed to pay advance income-tax. A notice was therefore issued to him on March 24, 1951, under section 28 read with section 18-A (2) of the Income-tax Act to show cause why a penalty should not be imposed for under-estimating his income. For the assessment year 1951-52 also the complainant in the usual course filed his return on August 11, 1951, and on a notice being issued to him produced his accounts before the Income-tax Officer on September 27, 1951. He again appeared before him on the 28th and the respondent told him that the "penalty papers had not been disposed of and that the accounts of the current year had also not been gone through" and asked the complainant to see him at his house on the following morning, which the complainant did. There he was told by the respondent that if he wanted to have his return accepted and to be helped in the matter of penalty proceedings he should pay the respondent Rs. 1,000 as illegal gratification. The complainant mentioned this fact to his manager and also that he had been told by the Income-tax Officer that his accounts were unsatisfactory. Because he was asked to do so the complainant saw the respondent at the latter's house on October 6 or 7 and he asked the complainant if he had brought the money and after some talk about the assessment the respondent asked the complainant to pay half the amount as it was Deepavali time. There is evidence of a defence witness also to show that towards the end of October 1951, the complainant was seen coming from the house of the respondent though the prosecution and the defence are not in accord as to the purpose of this visit.

The Circle Inspector, Munisami, P.W. 12, claims to have received complaints while at Madras about the respondent being corrupt and his "indulging in corrupt practices". He then came to Coimbatore and got into touch with the complainant and asked him if he had paid any bribe to the respondent. The complainant mentioned to the Inspector about the demand of a bribe by the respondent. At the instance of the Inspector the complainant appeared before the Tehsildar-Magistrate who recorded his statement P. 17 wherein the whole story of the demand of the bribe has been set out. The Inspector then gave ten one-hundred-rupee currency notes to

the complainant after their numbers were taken down in Exhibit P-17. The complainant then went to the office of the accused but no money was accepted on that day because the respondent had received an anonymous letter. Exhibit P-18 warning him of the trap which was being laid by the Malayalam people. The respondent naturally got very annoyed with the complainant and sent him away. The same evening the complainant was told that he was required to go to the house of the respondent on the following morning which he did at 8 A.M. The respondent told him that he should take no notice of the anonymous letter which must have been sent by his enemies and asked him to pay some money. The complainant paid a sum of Rs. 200 which on his return he entered in his kacha account book which the High Court has rejected without sufficient reason. On the evening of November 15, the complainant again went to the house of the respondent and the latter told him that he would pass final orders and that money should be paid. The record, P-7 and P-7 (*a*) shows that an order was dictated on November 13, although there is no proof or even indication that the complainant knew about it. The complainant was given 8 one-hundred rupee notes by the Inspector and the complainant paid them to the respondent on the morning of November 17, at the latter's house. On this occasion the complainant accompanied by his manager P.W. 14 had gone towards the house of the respondent along with the Magistrate and Circle Inspector and Venkatesa Iyer P.W. 14 in a car which was stopped three or four blocks away from the house of the respondent and only the complainant and his manager went into the respondent's house and paid the money. Two or three minutes later the Inspector P.W. 12 and the Magistrate P.W. 13 and one Sesha Ayyar who had joined the party *en route* also came into the house on receiving the signal from the complainant. They disclosed their identity to the respondent and told him that they had information that he had received Rs. 800 from the complainant as illegal gratification and asked him to produce the money which he had received from the complainant. The respondent did not say anything and got up from the chair on which he was sitting and tried to go into the house but was prevented from doing so by the Inspector and he then produced the money from the folds of his dhoti. While the *mahazar* was being prepared the respondent said that he had received this money as a loan from the complainant who denied this and said it had been paid as a bribe. A telegram was then sent to the Superintendent of Special Police Establishment and under his orders a case was registered and the investigation was then taken up by a Deputy Superintendent of Police who searched the house of the respondent on November 19, but no pronote seems to have been received or taken into possession on that date. A pronote with four-anna stamps affixed was later produced in the Court by the respondent on July 17, 1952, during the course of his statement under section 342, Criminal Procedure Code, but it was not mentioned to the Magistrate P.W. 13, by the respondent.

The charge against the respondent was that he had obtained from the complainant Rs. 800 as gratification other than legal remuneration as a motive or the reward for showing favour to him in the exercise of official functions and had thereby committed an offence punishable under section 161 of the Indian Penal Code read with section 4 of the Prevention of Corruption Act (II of 1947).

The explanation of the respondent was that he mentioned to the complainant about his money difficulties when accidently he met him on the road towards the end of August or beginning of September, 1951. The complainant offered to lend him Rs. 1,000. At that time he was not aware that the complainant had an assessment pending before him. It was the complainant who told him on November 15, when he met him again that the anonymous letter was the "work of his enemies" and promised to advance the loan as previously promised and he also suggested that the respondent should execute a pronote for Rs. 1,000 which would be attested by Venkatesa Ayyar to which he (the respondent) was agreeable. The complainant paid Rs. 800 on the morning of November 17 and promised to pay Rs. 200 in the evening. The respondent had the pronote ready and offered to hand it over in the morning but the complainant said he would take it when "he left the house."

The learned Special Judge accepted the story of the prosecution and after a careful analysis of the evidence found the respondent guilty of the offence charged and sentenced him to six months simple imprisonment.

On appeal being taken to the High Court the learned Single Judge reversed the judgment and acquitted the respondent. It will be convenient to give here the main findings of the learned Judge in his own words :

"(i) It is true that at the time when the money was accepted by the accused, the proceedings in relation to assessment of income-tax on P.W. 8 were pending before the accused. Naturally, therefore, if in such circumstances, the accused should receive money from an assessee, the suspicion is readily aroused that the money must have been paid only as an illegal gratification. On going through the judgment of the learned trial Judge, I formed the impression that he was totally influenced by such suspicion.

"(ii) The result is that if the version of P.W. 8 and that of the accused are balanced, the probability seems to tilt the scale in favour of the accused's version. In any case, the evidence is not enough to show that the explanation offered by the accused cannot reasonably be true, and so, the benefit of doubt must go to him.

(iii) But this was not a case of ordinary lendee, but an Income-tax Officer whose favour was needed by the lender.

(iv) Evidence shows that in November, 1951, the accused was in need of a sum of Rs. 1,000 and, for that purpose, has asked P.W. 8 for a loan.

(v) In my view, the evidence does not necessarily make out a case that the accused must have acccepted the money only as a bribe.

(vi) I do not therefore feel certain that the taking of a loan, with an obligation to repay it with interest, would fall within the meaning of the term 'gratification'."

The extent of the power of the Supreme Court to interfere with a judgment of acquittal was raised before us by the respondent's counsel and it was contended that the jurisdiction exercised by this Court under Article 136 was the same as that exercised by the Judicial Committee of the Privy Council and reliance was placed on a minority judgment by Venkatarama Aiyar, J., in *Aher Raja Khima* v. *The State of Saurashtra*[1], where the learned judge after discussing the various Privy Council judgments and quoting a passage from the judgment of this Court in *Pritam Singh* v. *The State*[2], observed :

"The preceding Article referred to in the opening passage is clearly Article 134. Article 134 (1) confers a right of appeal to this Court in certain cases, in terms unqualified, on questions both of fact and law, and if the scope of an appeal under Article 136 is to be extended likewise to questions of fact, then Article 134 (1) would become superfluous. It is obvious that the intention of the Constitution in providing for an appeal on facts under Article 134 (1) (*a*) and (*b*) was to exclude it under Article 136, and it strongly supports the conclusion reached in *Pritam Singh* v. *The State*[2], that like the Privy Council this Court would not function as a further court of appeal on facts in criminal cases."

The *State of Madhya Pradesh* v. *Ramakrishna Ganpatrao Limsey*[3], was also referred to by counsel for the respondent and it was contended that the Supreme Court should not interfere with the order of the High Court merely on the ground that it took a different view of the facts. That was an appeal which had been brought on a certificate by the High Court and not by Special Leave of this Court. That judgment was considered by a Constitution Bench in *State of Madras* v. *Gurviah Naidu Co., Ltd.*[4] and S.R. Das, Acting C.J., delivering the judgment of the Court pointed out that that was a decision of bench of three Judges and not of a Constitution Bench and the observation that there was no provision corresponding to section 417 of the Criminal Procedure Code only emphasised that this Court should not in appeal by Special Leave interfere with the order of acquittal passed by the High Court merely for correcting errors of fact or of law. *Gurviah Naidu's case*[4] was an appeal against a a judgment of acquittal and this Court reversed the judgment saying :

"In our view, the High Court erred in holding that the prosecution had failed to establish their case and in acquitting the accused."

This case negatives the contention that under Article 136 interference by this Court with findings of High Courts in judgments of acquittal is not intended. Even in

1. (1955) 2 S.C.R. 1285, 1301: (1956) S.C.J. 243 : (1956) 1 M.L.J. (S.C.) 133: (1956) An.W.R. (S.C.) 135.
2. (1950) S.C.R. 453, 458.
3. A.I.R. 1954 S.C. 20.
4. A.I.R. 1956 S.C. 158, 161.

State of Madhya Pradesh v. *Ramakrishna Ganpatrao Limsey*[1], Mahajan, J., was of the opinion that the Supreme Court can interfere where the High Court "acts perversely or otherwise improperly or has been deceived by fraud."

In *Pritam Singh* v. *The State*[2], Fazl Ali, J., after a careful examination of Article 136 along with the preceding Articles stated the scope of the appeal under Article 136 to be:

> "Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

Even the Privy Council in laying down the permissible limits for review in criminal matters included things "so irregular or so outrageous as to shake the very basis of justice." See *Mohinder Singh* v. *The King*[3].

An instance of this principle is the decision of the Privy Council in *Stephen Senevirtane* v. *The King*[4], which will be discussed later in this judgment and which has been approved of by this Court.

Interpreting the following words of section 205 of the Government of India Act 1935 "any judgment, decree or final order of a Court" and "it shall be the duty of every High Court in British India to consider in every case", Lord Thankerton in *King Emperor* v. *Sibnath Bannerji*[5], said:

> "The purpose of the provision is to confer a right of appeal in every case that involves substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder."

One of the questions for decision in that case was whether an appeal lay in cases of *habeas corpus*. Lord Thankerton there observed:

> "In the absence of an express exception of *habeas corpus* cases, and having in view the terms and purpose of the section, their Lordships are unable to limit the terms of the section by mere construction so as to exclude these cases from its operation."

In Article 136 the use of the words "Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India" show that in criminal matters no distinction can be made as a matter of construction between a judgment of conviction or acquittal. In *Bhagwan Das* v. *The State of Rajasthan*[6], the following observation of the Judicial Committee of Privy Council in *Stephen Senevirtane* v. *The King*[4], at page 299:

> ". . . . . there are here no grounds on the evidence, taken as a whole, upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty. . . . . ."

was quoted with approval and after an examination of all the facts and circumstances of the case the Supreme Court reversed the judgment of conviction by the High Court under Article 136. The question for decision in the present case is whether it falls within the limits laid down in the abovementioned cases. This Court will not readily interfere with the findings of fact given by the High Court but if the High Court acts perversely or otherwise improperly interference will be called for.

The findings of the High Court in the present case are, to say the least halting, and the approach to the whole question has been such that it falls within what Mr. Justice Mahajan in *State of Madhya Pradesh* v. *Ramakrishna Ganpatrao Limsey*[1], described as "acting perversely or otherwise improperly". Although the learned High Court Judge has in the beginning of the judgment mentioned the presumption which arises under section 4 of the Prevention of Corruption Act (II of 1947), the following passage in the judgment:

> "in any case, the evidence is not enough to show that the explanation offered by the accused cannot reasonably be true, and so, the benefit of doubt must go to him"

1. A.I.R. 1954 S.C. 20.
2. (1950) S.C.R. 453, 458.
3. (1932) 64 M.L.J. 77 : L.R. 59 I.A. 233, 235 (P.C.).
4. A.I.R. 1936 P.C. 289.
5. (1945) 2 M.L.J. 325 : (1945) L.R. 72 I.A. 241, 255 : (1945) F.C.R. 195.
6. (1957) S.C.J. 515 : (1957) M.L.J. (Crl.) 478 : A.I.R. (1957) S.C. 589.

is indicative of a disregard of the presumption which the law requires to be raised under section 4. The relevant words of this section are :

"Where in any trial of an offence punishable under section 161. . . . . . it is proved that an accused person has accepted . . . . any gratification (other than legal remuneration) . . . . . from any person, it shall be presumed unless the contrary is proved that he accepted. . . . . . that gratification. . . . . as a motive or reward such as is mentioned in the said section 161 . . . . . ."

Therefore where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the Legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but section 4 of the Prevention of Corruption Act is in *pari materia* with the Evidence Act because it deals with a branch of law of evidence, *e.g.*, presumptions and therefore should have the same meaning. "Shall presume" has been defined in the Evidence Act as follows :

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under section 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumptions of law constitute branch of jurisprudence. While giving the finding quoted above the learned Judge seems to have disregarded the special rule of burden of proof under section 4 and therefore his approach in this case has been on erroneous lines.

The judgment also shows that certain salient pieces of evidence were missed or were not properly appreciated.

At the time when the penalty notice was issued under section 28 of the Income-tax Act the respondent was not the Income-tax Officer at Coimbatore but by June 6, he had been posted at Coimbatore and the note on the Penalty File, dated June 6, 1951

"put up proposal to I.A.C. for levy of standard penalty"

was made by him. Although this proposal was made on June 6, 1951, it is not clear as to what final orders were passed in these proceedings and when. At least there is nothing to indicate that any intimation was given to the complainant in regard to this matter. The complainant has stated on oath as P.W. 8 :

"I alone went to the accused on 28th September, 1951. He then told me that the penalty paper was not disposed of and that the accounts for the current year had not also been gone through."

On the day following this the respondent asked the complainant for illegal gratification of Rs. 1,000. Counsel for the respondent contended that there was no occasion for the respondent to say anything about the penalty proceedings because as far as he was concerned the recommendation had already been made by him but the real question is whether the complainant was told as to what had happened or had any knowledge of this. He states that he had none and there is nothing to indicate that he had.

The respondent has then stated that the complainant was known to him since 1942 when he, the respondent, was the Head Clerk of the Appellant Assistant Commissioner of Income-tax and that is the reason why towards the end of August or the beginning of September when he casually met the complainant on the road, he told him that he was in financial difficulties and the complainant offered him a loan of Rs. 1000 to be returned in easy instalments and that he did not know at that time that the complainant was an assessee before him. This statement of the respondent has been accepted by the High Court without considering the following important facts. Notice was issued to the complainant and he filed his return on August 11, 1951. The notice must have been issued to the complainant under section 22 (2) of the Income-tax Act by the respondent himself as he was at that time the Income-tax Officer. So it is difficult to believe his statement about his not know-

ing that the complainant was an assessee before him and it is improbable that the respondent would mention his financial troubles to a more or less a casual acquaintance who has neither been shown to be a banker, nor a moneylender nor a wealthy person. The complainant has stated that he visited the respondent on 6th or 7th October, 1951, when he asked him if he had brought the money. The complainant replied that he had no money to spare as he had purchased a house and he also asked him if the respondent had finished the assessment. The latter's reply was that he would look into the matter and also told him that the complainant might pay half the amount (of the illegal gratification) before the deepavali time. This statement the respondent has denied but the statement of the complainant as to his having no money as he had purchased a house has not been seriously challenged in cross-examination.

The complainant had been asked to produce the accounts and he did produce them on September 27. The notes made by the respondent in P.7 and P-7 (*a*) show that the accounts of the complainant were not being accepted in regard to Coimbatore Hotel. The portion of the order was :

> " All the defects that are usual in hotel accounts exist here ".

In regard to Bhavanisagar hotel the note stated :

> " Purchases are not fully supported and sales are reckoned from till takings."

On October 1, 1951, the assessee had filed his written statement and also some other documents. Nothing more seems to have been done till November 7, when the relevant part of the note on the file is :

> " I have been keeping this in order to compare the results with other nearby hotels ".

As to why no enquiries could be made in the whole of this period is not clear from the assessment record and it lends support to the prosecution case that the respondent was making approaches to the complainant to get money from him. The respondent during the pendency of assessment proceedings of the complainant allowed the complainant to visit him at his house and even paid visits to his cafe. Even according to the findings of the High Court the complainant was "needing the favours" of the respondent who on his own showing was himself in dire need of a thousand rupees as he had succeeded in collecting only a thousand rupees by November 2, and needed twice that amount for his son's premium or security as he chooses to call it. No importance was attached to this aspect of the case by the learned Judge of the High Court. In our opinion the learned trial Judge correctly appreciated this part of the prosecution case and his judgment is not, as the High Court has said, coloured by mere suspicion.

On November 6, 1951, the Sub-Inspector Munisami contacted the complainant and arrangement was made for Rs. 1,000 to be paid by the complainant to the respondent and the money was actually taken by the complainant and offered to the respondent on November 8, which the respondent did not accept as he had received an anonymous letter Exhibit P-18 which was dated November 6, 1951, in which the respondent had been warned that Malayalam people were attempting to "ruin him". Inspite of this warning the respondent continued to have truck with the complainant and actually accepted Rs. 800 from him. It is true that when soon after the money was paid and the Inspector P.W. 12 and the Magistrate P.W. 13 arrived at the house of the respondent and asked him about this money he stated that he had taken it as a loan but in the context in assumes a different complexion. The statement of the Magistrate P.W. 13 was :

> " While the mahazar was being prepared the accused volunteered and told me that he had received the 800 rupees as a loan from P.W. 8—the complainant."

This witness had also stated that when he went into the verandah of the house, he asked the respondent whether he had received an illegal gratification from the complainant and also asked him to produce the money. The accused did not say anything but got up from the chair and tried to go inside the house which he was prevented from doing by the Inspector P.W. 12. The witness added :

"The accused was seen trembling and meddling with something under the towel. I asked the accused to remove the towel. The accused removed the towel. I saw some bulging at his waist in the dhoti he was wearing. I asked him again to produce the currency notes. He produced them from the folds of the dhoti he was wearing. When producing the currency notes the accused did not say anything."

No real cross-examination was directed against these portions of the statement of the Magistrate P.W. 13 nor has the High Court correctly appreciated them or given them due weight. The respondent produced before the Special First Class Magistrate on July 11, 1952, an unsigned pronote for Rs. 1,000 executed by him in favour of the complainant. That pronote was not found in the house when the search was made by the Deputy Superintendent of Police on November 19, 1951, and it is not explained why the pronote should have been made for Rs. 1,000 when actually the amount paid was only 800 and why the respondent offered to give this pronote to the complainant without receiving full consideration.

These salient features of the case do not seem to have been properly appreciated or given due weight to by the High Court and in our opinion the learned Judge's approach to the question whether the sum of Rs. 800 was an illegal gratification or a loan is such that the judgment falls within the words of Mahajan, J., in *Ramakrishna's case*[1], *i.e.*, that the High Court has acted perversely or otherwise improperly. The evidence and the circumstances lead to the conclusion that the transaction was not one of loan but illegal gratification.

In view of the finding that the sum of Rs. 800 was a bribe and not a loan it is not necessary to consider whether in this case the loan would be an illegal gratification within section 4 of the Prevention of Corruption Act (II of 1947) or not.

We would, therefore, allow this appeal, set aside the judgment and order of the High Court of Madras and restore that of the Special Judge of Coimbatore convicting the respondent of the offence he was charged with. The respondent must surrender to his bail bond.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. GOVINDA MENON AND J. L. KAPUR, JJ.

Ramaswamy Nadar .. *Appellant**

v.

The State of Madras .. *Respondent.*

Criminal Procedure Code (V of 1898), section 423—Scope—Powers of High Court—High Court confirming order of acquittal of offence under section 420, Penal Code if can at the same time commit accused of offence under section 403 of the Penal Code (XLV of 1860).

There is no warrant either in principle or on authority for the contention that the High Court is not authorised by section 423 (1) (*a*), Criminal Procedure Code, to convert an order of acquittal into an order of conviction in respect of an offence other than that for which the accused was tried by the trial Court and acquitted by it. It cannot be said that the High Court could not confirm the order of the trial Court acquitting the accused of an offence under section 420, Indian Penal Code, and at the same time, convict him of an offence under section 403, Indian Penal Code.

[However it was held on the merits that misappropriation has not been made out either on evidence or as a matter of law].

Appeal by special leave from the Judgment and Order dated the 3rd April, 1957, of the Madras High Court in Criminal Appeal No. 393 of 1956 arising out of the Judgment and Order dated the 10th February, 1956, of the Court of the Fourth Presidency Magistrate, G.T., Madras in C.C. No. 10027 of 1955.

H. J. Umrigar and *R. Ganapathy Iyer*, Advocates, and *G. Gopalakrishnan*, Advocate of *Messrs. Gagrat & Co.*, for Appellant.

P. Ranga Reddy and *T. M. Sen*, Advocates, for Respondent.

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1. A.I.R. 1954 S.C. 20.

* Crl. A. No. 153 of 1957. 11th/21st October, 1957.

The Judgment of the Court was delivered by

Sinha, J.—This appeal by special leave is directed against the judgment and order of a Single Judge of the Madras High Court, dated April 3, 1957, setting aside the order of acquittal passed by the Fourth Presidency Magistrate at Madras, dated February 10, 1956, on a charge under section 420, Indian Penal Code. The Government of Madras appealed against the order of acquittal and the appeal was heard by a Single Judge of that Court. The learned Judge allowed the appeal, but did not convict the appellant under section 420, Indian Penal Code, which was the original charge against him in the trial Court, but under section 403, Indian Penal Code, for misappropriation, and sentenced him to the maximum period of two years' rigorous imprisonment. Hence, this appeal.

The appellant used to carry on prize-competitions as the proprietor of the 'Lotus Cross Words'. Certain persons who had paid moneys in connection with the prize-competition No. 92, complained that they had not received their prize money though it had been announced that they had competed for the prizes offered. The police, after investigation, submitted a charge-sheet against the accused to the effect that he had, between May 20, 1955 and June 10, 1955, in his capacity as the proprietor of the 'Lotus Cross Words', dishonestly induced P.Ws. 1 to 3 to compete in his 'bumper competition' No. 92, by paying entry fees to the tune of Rs. 2,640 on the representation that the prize winners will get a sum of Rs. 3,10,000, and that on that representation he had collected one lac and fifteen thousand odd rupees from the public, out of which he had spent about ninteen thousand rupees towards expenses of advertising and holding the competition. Though P.Ws. 1 to 3 and others had been declared as the first prize winners, the accused had not distributed even the amount actually collected minus the expenses aforesaid, that is to say Rs. 96,000 odd, the amount of the net collections. The prosecution examined a number of witnesses to prove that the appellant had been holding crossword competitions and a large number of persons had paid moneys by way of entry fees; that the competition in question, namely, competition No. 92, had been advertised with a guranteed sum of Rs. 3,10,000 by way of prizes; that as a matter of fact a much smaller sum had been collected by way of entry fees; that the three prosecution witnesses aforesaid and others had been, in due course, declared to be the first prize winners, but that none of them had been paid any money. It is also in evidence that a large number of other 'bumper competitions' namely Nos. 80, 84 and 88, had similarly been held and large sums were advertised to have been guaranteed as prize moneys. None of those 'bumper competitions' yielded the sum so guaranteed. The gravamen of the charge against the accused, was that in spite of his recent experience that none of those 'bumper competitions' attracted a sufficiently large number of competitors to yield the guaranted prize money, the accused had advertised the competition No. 92 with a guaranteed prize money of Rs. 3,10,000 and that in spite of his having collected about one lac and fifteen thousand odd rupees by way of entry fees, none of the prizes declared to have been won by prosecution witnesses 1 to 3 and others, had actually been paid. It was, therefore, suggested by the prosecution that the recent histo y of the prize competitions conducted by the appellant, would show that he was actuated by a dishonest intention when he collected one lac and fifteen thousand odd rupees by way of entry fees, and did not utilize any part of the collected amount towards payment of the prizes offered. A large volume of documentary evidence furnished by the appellant's registers and account books was adduced in support of the prosecution case.

In his defence, the appellant stated in his written statement that he started the 'Lotus Cross Words' in August, 1953, with a capital of twenty thousand rupees, and conducted 93 competitions, but due to insufficient collections in the recent competitions, he was not able to respect all his obligations, so much so that he was forced to close down the business owing to loss, on June 22, 1955. And to show his *bona fides*, he had disbursed over a lac of rupees even after the closure of the business and had settled the claims of six thousand out of seven thousand prize winners. He, thus, claimed that less than one thousand persons' claims had remained unsatisfied in spite of his borrowing money to carry out his obligations.

The learned Magistrate, on an elaborate examination of the evidence led before him by the parties, observed in his judgment that the accused had not denied the truth of the allegations of fact made by the prosecution, but had only challenged the insinuations against him that he was actuated by a dishonest intention in carrying on the competitions, particularly, No. 92. He found that none of the statements made in the advertisements had been shown to be untrue; that it was a fact that at the time, the competition No. 92 had been announced in the papers, the accused owed a total debt of prize moneys amounting to about four lacs of rupees in respect of the previous competitions; that the accused had other debts to th tune of a lac and fifty seven thousand odd rupees and that recent competitions had not even yielded sufficient amounts, collected by way of entry fees, to cover the guaranteed prize moneys. But he also found that the accused had applied his own funds amounting to about a lac and a half rupees to the payment of prize moneys. He found that the prosecution had failed to substantiate its allegations that ninety six thousand odd rupees, out of the entry fees collected for the competition No. 92, had been utilized by him for his own purposes and not for carrying on the competitions. He observed that there was no evidence that the accused had used any part of the entry fees collected in any of the competitions, for his own use, or that he took any financial benefit out of the moneys collected in the recent competitions including No. 92. In other words, the Court found that in order to meet the heavy demands of the prize winners in respect of the previous competitions, the accused had spent not only the amounts collected by him but also about one and a half lacs of rupees of his own capital. Thus, instead of making any gain for himself, the accused had incurred a total loss of about a lac and a half of rupees, and still he had to meet other prize winners demands, including those of the three prosecution witnesses aforesaid. On those considerations, his finding was that the accused may have been "absolutely foolish and reckless and far too optimistic" in expecting large sums of money by way of collections of entry fees, but that he had not been guilty of any fraudulent or dishonest conduct. Ultimately, he came to the following conclusion:

> "The mere fact that the accused had been utterly reckless and irresponsible in his conduct of the Lotus Cross Words and thereby caused loss to certain persons cannot however impute a criminal liability to him. Hence I find that the prosecution has not proved beyond reasonable doubts the guilt of the accused."

On appeal by the State to the High Court of Madras, the learned Single Judge (Somasundaram, J.) agreed with the trial Court in acquitting the appellant of the charge under section 420, Indian Penal Code, but he convicted him of misappropriation, under section 403, Indian Penal Code. He held that dishonesty at the initial stages may not have been there, but according to him, there was no justification for the accused not having disbursed the ninety six thousand odd rupees, the net amount of collection in competition No. 92 *pro rata* amongst the declared prize winners. As large amounts were involved in the transaction which was the subject-matter of the charge against the accused, he imposed the maximum punishment of two years' rigorous imprisonment.

Substantially two points were raised on behalf of the appellant in support of the appeal, namely, (1) that the Hgh Court is not authorized by section 423 (1) (*a*), Criminal Procedure Code, to convert an order of acquittal into an order of conviction in respect of an offence other than that for which the accused was tried by the trial Court and acquitted by it, that is to say, the High Court could not confirm the order of the trial Court acquitting the accused of an offence under section 420, Indian Penal Code, and, at the same time, convict him of an offence under section 403, Indian Penal Code, and (2) that on the facts and circumstances of this case, no offence under section 403, Indian Penal Code, has been made out. Before dealing with the appeal on the merits covered by the second contention, it is convenient to dispose of the first point. The powers of the High Court, while disposing of an appeal against an order of acquittal, are contained in section 423 (1) (*a*), Criminal Procedure Code, which is in these terms :

423. (1) (a) "in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;"

It was argued that the appellate Court is authorized (a) to reverse an order of acquittal, and (b) to direct further inquiry, or (c) to direct that the accused be retried or committed for trial, or (d) to find him guilty and to sentence him according to law. It is pointed out that there is no power in the High Court to alter the finding or the charge or the nature of the offence, as is specifically conferred on the High Court under clause (b) of section 423 (1). This argument is based on the absence from clause (a) aforesaid, of the following words which occur in clause (b) ;

"........or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence............"

In our opinion the words just quoted out of clause (b) which deals with an appeal from a conviction were not necessary for the purpose of clause (a) which deals with an appeal from an order of acquittal. Under both the clauses (a) and (b), the specific power to reverse the order appealed from, is there, but because there has been a conviction by the trial Court or the Court immediately below the High Court, the latter Court is authorised specifically to alter the finding or the nature of the sentence in clause (b). In clause (a), after the High Court has decided to reverse the order of acquittal, it has been given the power to find the accused guilty, besides other powers enumerated above. The question naturally arises "find the accused person guilty of what?" The answer sought to be given by the counsel for the appellant is that the High Court may find him guilty of the offence with which he stood charged in the Court below and of which he was acquitted ; but not of the offence disclosed by the evidence as that would be adding to the words of clause (a) the words "of the offence disclosed" or words to that effect which would be contrary to the intention of the Code as is shown by the words of clause (b). But this argument is wholly ineffective because in either view of the matter the Court has to supply some words in answer to the question "find him guilty of what?" According to the appellant those additional words should be "of such offence as has been charged and of which he had been acquitted", and according to the other view, "of the offence disclosed". If, in construing the section, the Court has to supply some words in order to make the meaning of the statute clear, it will naturally prefer the latter construction which is more in consonance with reason and justice. It was also argued on behalf of the appellant that this being a penal statute, the words of the statute should be very strictly construed, but even so, the necessity for supplying certain additional words is there in either view of the matter. It has not been contended that the trial Court could not have exercised the powers contained in sections 236, 237 and 238 of the Criminal Procedure Code. What was contended was that though those powers may be exercised by a trial Court or even by a Court of Appeal exercising its powers, under clause (b) of section 423 (1), the High Court could not exercise those powers acting under clause (a) of that section. But we do not see any sufficient ground for so restricting the powers of the High Court hearing an appeal under section 423 (1) (a). No rulings have been placed before us in support of the contention that section 423 (1) (a) does not authorise a High Court to find the accused person guilty of any offence other than that with which he has been charged. On the other hand, there is a ruling of a Division Bench of the Bombay High Court in *Emperor* v. *Ismail Khadirsab*[1]. In that case, the accused person had been acquitted of the charge of murder and on appeal against the acquittal, the Bombay High Court maintained the acquittal in respect of the charge of murder, but held the accused guilty of the offence of fabricating false evidence. We are not concerned with the correctness of the actual decision of the High Court, but only with the fact that the High Court recognized and acted upon the principle that it is open to the High Court, while deciding an appeal from an order of acquittal, to convict the accused person of an offence other than that with which he had been charged. It was sought to be argued on behalf of the

1. (1928) I.L.R. 52 Bom. 385.

appellant that the High Court purported to follow the decision of their Lordships of Judicial Committee of the Privy Council in *Begu* v. *Emperor*[1], but it is contended that this was a case of an appeal from a conviction and not an appeal from an order of acquittal. But it would appear that the decision of their Lordships of the Judicial Committee, was not based on a consideration of the language of section 423, but of the provisions of sections 236 and 237 of the Code. In our opinion, there is no warrant either in principle or on authority, for the first contention raised on behalf of the appellant. This contention is, therefore, overruled.

It remains to consider the merits of the decision of the High Court. The conclusions of the High Court may be stated in its own words in the last paragraph of its judgment:

> "Before parting with this judgment I am constrained to observe that the order of acquittal passed by the Magistrate is a perverse one. He is aware and finds also that a sum of Rs. 96,548-2-3 remained with the accused without being paid to the prize-winners. The learned Magistrate seems to think that the prosecution must let in further evidence of misappropriation. I am unable to understand the reasoning of the Magistrate when he says that there is no evidence of misappropriation. Having found that a sum of Rs. 96,548-2-3 has not been distributed to the prize winners in the competition No. 92 and that he utilized the same towards the debt incurred in the previous competitions, one would have thought that misappropriation is clearly established."

In our opinion, thes observations are very much wide of the mark. The High Court has not reversed any of the findings of fact recorded by the learned Magistrate. It has differed only on the inference to be derived from those findings. The learned trial magistrate refused to draw an inference of dishonesty from those facts. The High Court has come to the contrary conclusion. The question is: was the High Court justified in coming to the conclusion that " misappropriation is clearly established " ? In our opinion, the High Court has erred in coming to that conclusion. In order to prove an offence under section 403, Indian Penal Code, the prosecution has to prove that the property, in this case, the net amount of ninety six thousand odd rupees, was the property of the prosecution witnesses 1 to 3 and others, and (2) that the accused misappropriated that sum or converted it to his own use, and (3) that he did so dishonestly. In our opinion, none of these constituent elements of the offence can be categorically asserted to have been made out. The entry fees rightly came into the coffers of the accused. No doubt, he had promised to award prizes of the total value of Rs. 3,10,000, but there was no further obligation that the prize money had to come either wholly or in part from out of the sum collected by him by way of entry fees. He was carrying on the business and was found by the Courts below to have disbursed lacs of rupees to winners of prizes in the previous competitions, and it was conceded on behalf of the prosecution that there is no express provision in the rules and conditions of the "Lotus Cross Words" exhibited in this case that there was any obligation on the part of the appellant to set apart specific sums collected by way of entry fees for disbursement amongst the prize winners. As a matter of contract, the legal liability of the appellant to pay the prize winners was there irrespective of the consideration whether or not he made enough money to provide for the payment of the prizes declared as a result of the competition. But it was sought to be argued that though there was no specific provision in any statute or other law that the money collected by way of entry fees, should be reserved for payment to the prize-winners in that very competition, the appellant was some sort of a trustee or bailee and should have seen to it that the collected amount was disbursed amongst the prize-winners. There was no such entrustment nor was there any rule laid down for appropriation of the sum collected in a particular way. There being no duty to make appropriation in a particular way, the appellant could not be held guilty of having misappropriated the ninety six thousand odd rupees which was the total net collection in competition No. 92. As already pointed out, the learned trial magistrate had come to the finding that there is no evidence that any amount out of this collection had been appropriated by the appellant to his own personal use. Whatever amount he had been collecting, he had been applying to running his business. It is true that the later competitions were a losing concern, but as

1. (1925) 48 M.L.J. 643: L.R. 52 I.A. 191; I.L.R. 6 Lah. 226 (P.C.).

rightly pointed out by the learned trial magistrate, the appellant cannot be criminally liable for being reckless or unwise in carrying on his business. In our opinion, therefore, the learned Judge below was in error in characterizing the order of acquittal as a perverse one. The learned Judge's decision is based on an erroneous assumption that the appellant was bound by law to disburse the amounts collected in a particular competition amongst the prize-winners of that competition. But it has not been pointed out by what process that conclusion was reached. Nor has the learned counsel for the respondent brought any statutory or other rule to our notice casting an obligation on the appellant to appropriate the entry fees in a particular manner That being so, it must be held that misappropriation has not been made out either on evidence or as a matter of law.

In the result, the appeal is allowed and the order passed by the High Court set aside and the order of acquittal passed by the trial Court is restored.

Sinha, J.—When hearing of this appeal was finished last week by a Bench consisting of three of us, B. P. Sinha, P. Govinda Menon and J. L. Kapur, JJ., we announced that we had come to the conclusion that the appellant should be acquitted. We also indicated that the judgment will be delivered the week following. The draft of the judgment was sent to late Mr. Justice Menon last week and he had approved of it. What we are now delivering are the reasons of the Judges who constituted the Bench; but it will be signed by two only of us on account of the unexpected death of Mr. Justice Menon.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—N. H. BHAGWATI, B. P. SINHA, S. J. IMAM, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

S. Rm. Ar. S. Sp. Sathappa Chettiar .. *Appellant**

v.

S. Rm. Ar. Rm. Ramanathan Chettiar .. *Respondent.*

Advocate-General, for State of Madras .. *Intervener.*

Court-Fees Act (VII of 1870) (as amended in Madras), sections, 5, 7 (iv) (b) and 12 and Art. 17-B of Schedule II—Madras High Court Fees Rules, 1933, Order 2, rule 1—Claim for partition on the Original Side of the High Court—Court-fee—Decision of Chamber Judge, finality of—Appeal from decree of dismissal on merits—Applicability of section 12.

In a suit on the Original Side of the High Court of Madras, the plaintiff paid a Court-fee of Rs. 100 under Article 17-B of Schedule II to the Court-Fees Act (VII of 1870) (as amended in Madras) on the claim, *inter alia*, for partition in the suit. The Chamber Judge on reference by the taxing officer held that Article 17-B applied and the Court-fee paid was correct. On the dismissal of the suit on merits, the plaintiff appealed paying the same Court-fee as in the plaint and stating the (same) valuation for purpose of jurisdiction at Rs. 15,00,000.

A Bench was constituted by the Chief Justice, on the reference by the Master of the dispute as to Court-fee, as required by section 5 of the Act. The Bench held it was not bound by the decision of the Chamber Judge and that section 7 (iv) (*b*) applied to the claim for partition and appellant was directed to state his valuation for Court-fees. The appellant gave his valuation at Rs. 50,000 and paid the deficit Court-fee. On further objection by the Registry, the Bench held that the valuation in the plaint of Rs.15,00,000 cannot be amended and Court-fee had to be paid on the appeal memorandum on that basis and further ordered the payment of deficit Court-fee on the plaint also on the same basis.

Hence the appeal to Supreme Court.

Held:—(1) There was nothing on record to show any general or special order as contemplated by section 5 of the Court-Fees Act (VII of 1870) (as amended in Madras) and so the Division Bench was right in refusing to attach finality, to the order of the Chamber Judge that Article 17-B of Schedule II applied to the claim for partition made in the suit.

*Civil Appeal No. 203 of 1956. 28th November, 1957.

(2) Notwithstanding that the provisions of Chapter III of the Act would not apply to suits on the Original Side of the High Court and appeals therefrom when judged solely by the provisions of the Act, Order 2, rule 1 of the Madras High Court Fees Rules, 1933, renders sections 7(*a*) to (*f*) along with the proviso as well as Article 17-B of Schedule II applicable thereto. The latter portion of the rule added in 1949 makes applicable to suits on the Original Side and appeals therefrom the provisions of the Act as regards the scale of fees, the manner of their levy and the refund of fees; it also makes applicable the relevant provisions of the act "in every other respect" which expression in the context indicates clearly that section 12, which confers upon the appellate Court authority or jurisdiction to examine about the sufficiency or otherwise of the Court-fees paid not only on the memorandum of appeal but also on the plaint, is obviously intended to apply. The Bench was therefore justified in exercising jurisdiction under section 17 (1) and (2).

(3) The prior order of the Bench, that section 7 (iv) (*b*) applied was one under section 5 and it is therefore final between the parties: leave was rightly given to the appellant (plaintiff) to value the claim for partition for Court-fees. When he exercised his option under section 7(iv)(*b*) and valued it at Rs. 50,000 and paid the deficit Court-fee on memorandum of appeal the same will be the valuation for jurisdiction under section 8 Suits Valuation Act. The Bench should have allowed him, under the circumstances, to amend the valuation for payment of Court-fees under section 7 (iv) (*b*) not only on the memorandum of appeal but also on the plaint at Rs. 50,000.

Appeal by Special Leave from the Orders, dated the 25th January, 1955 of the Madras High Court in C. M. P. No. 9335 of 1954 and S. R. No. 55247 of 1953†.

K. S. Krishnaswamy Iyengar, Senior Advocate (*R. Ganapathy Iyer*, Advocate and *G. Gopalakrishnan*, Advocate of *Messrs. Gagrat & Co.*, with him), for Appellant.

C. K. Daphtary, Solicitor-General of India (*M. S. K. Sastri*, Advocate, with him), for Respondent.

S. Venkatakrishnan and *T. M. Sen*, Advocates, for Intervener.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is a plaintiff's appeal by Special Leave against the order passed by a Division Bench of the Madras High Court on January 25, 1955, calling upon him to pay Court-fees on the valuation of Rs. 15,00,000 both on his plaint and on his memorandum of appeal and it raises some interesting questions of law under the provisions of the Court-Fees Act (which will be described hereafter as the Act).

The appellant had filed Civil Suit No. 311 of 1951 on the Original Side of the Madras High Court. In this suit he had claimed partition of the joint family properties and an account in respect of the joint family assets managed by the respondent. The appellant is the son of Subbiah Chettiar. His case was that Subbiah had been adopted by Lakshmi Achi in 1922. Lakshmi Achi was the widow of the undivided paternal uncle of the respondent. As a result of his adoption Subbiah became a coparcener in his adoptive family and, as Subbiah's son, the appellant claimed to have a share in the joint family properties and in the assets of the joint family and that was the basis on which a claim for partition and accounts was made by the appellant in his suit. In the plaint it had been alleged that Subbiah had filed a suit for partition of his share and had obtained a decree in the trial Court. The respondent had taken an appeal against the said decree in the High Court. Pending the appeal the dispute was settled amicably between the parties and in consideration of payment of a specified sum and delivery of possession of certain sites Subbiah agreed to release all his claims and those of his son, the present appellant, in respect of the properties then in suit. According to the appellant, this compromise transaction did not bind the appellant and so he claimed to recover his share ignoring the said transaction between his father and the respondent. The plaint filed by the appellant valued the claim for accounts at Rs. 1,000 under section 7(iv) of the Act and a Court-fee of Rs. 112-7-0 was paid on the said amount on an *ad valorem* basis. In regard to the relief for partition the fixed Court-fee of Rs. 100 was paid by the appellant under Article 17-B (Madras) of Schedule II of the Act. For the purposes of jurisdiction, however, the appellant gave Rs. 15,00,000 as the value of his share.

† (1955) 2 M.L.J. 408; I.L.R. (1956) Mad. 341.

It appears that the Registry, on examining the plaint, was inclined to take the view that the plaint should have borne Court-fee under section 7 (*v*) in respect of the claim for partition. Since the appellant did not accept this view the matter was referred to the Master of the Court who was the taxing officer under the Madras High Court Fees Rules, 1933. The Master felt that the issue raised by the Registry was of some importance and so, in his turn, he referred the dispute to the Judge sitting on the Original Side under section 5 of the Act. This reference was decided by the Chamber Judge Krishnaswamy Naidu, J., on October 18, 1951. The learned Judge held that the appellant was not bound to set aside the prior compromise decree between his father and the respondent and that the plaint was governed by Article 17-B of Schedule II. Accordingly the Court-fee paid by the appellant in respect of his claim for partition was held to be in order.

In due course the respondent was served and he filed a written statement raising several contentions against the appellant's claim for partition and accounts. One of the points raised by the respondent was that the compromise and the release deed executed by the appellant's father and the decree that was subsequently passed between the parties were fair and *bona fide* transactions and, since they amounted to a settlement of the disputed claim by the appellant's father, the plaintiff was bound by them.

Ramaswamy Gounder, J., who heard the suit tried the respondent's contention about the binding character of the compromise decree as a preliminary issue. The learned Judge held that there was a fair and *bona fide* settlement of the dispute by the appellant's father acting as the manager of his branch and so the appellant was bound by the compromise decree. In the result, the appellant's suit was dismissed on September 22, 1953.

Against this decree the appellant presented his memorandum of appeal on December 1, 1953. This memorandum bore the same Court-fees as the plaint. On examining the memorandum of appeal the Registry again raised the question about the sufficiency of fees paid by the appellant. The Registry took the view that the appellant should have paid Court-fees under section 7 (v) of the Act in respect of his claim for partition as the appellant's claim in substance was a claim for recovery of possession based on title within the meaning of section 7(v). The matter was then referred to the Master but, in his turn, the Master again made a reference to the Taxation Judge under section 12(2) of the Act. Thereupon the learned Chief Justice constituted a Bench of two Judges to deal with this reference.

The learned Judges who heard the reference did not think it necessary to consider whether section 12 of the Act was applicable to the present appeal. They dealt with the reference as made under section 5 of the Act. The appellant urged before the Division Bench that the order passed by Krishnaswamy Naidu, J., was final since it was an order passed under section 5 of the Act. The learned Judges did not accept this contention. They held that the record did not show that Krishnaswamy Naidu, J., had been nominated by the Chief Justice to hear the reference under section 5 either by a general or a special order and so no finality could be claimed for the said order under section 5 of the Act. On the merits the learned Judges agreed with the view taken by Krishnaswamy Naidu, J., and held that section 7(v) of the Act was not applicable to the appellant's claim for partition. According to the learned Judges, neither was Article 17-B of Schedule II applicable.

They held that the provisions of section 7(iv) (*b*) of the Act applied. That is why the appellant was directed to mention his value for the relief of partition under the said section. It may be mentioned at this stage that this order became necessary because in the plaint the plaintiff had not specifically mentioned the value for the relief of partition claimed by him. He had merely stated that for the relief of partition claimed by him he was paying a Court-fee of Rs. 100 in accordance with Schedule II, Article 17-B. All that he had done in the plaint was to value his total claim for jurisdiction at Rs. 15,00,000.

In compliance with this order the appellant valued his relief to enforce his right to share in the joint family properties in suit at Rs. 50,000, paid the deficit Court-fee Rs. 1,662-7-0 and re-presented his memorandum of appeal in Court on May 7, 1954.

That, however, was not the end of the present dispute in respect of Court-fees The Registry raised another objection this time. According to the Registry, since the appellant had valued his relief in the suit for purposes of jurisdiction at Rs. 15,00,000, it was not open to him to value his relief on the memorandum of appeal under section 7(iv) (*b*) without an amendment of the valuation made in the plaint. Since the appellant did not accept this view of the Registry, the matter was again placed before the Court for orders. The appellant then offered to file an application for formal amendment of his plaint by substituting Rs. 50,000, in place of Rs. 15,00,000, for the jurisdictional value of his relief. Accordingly the appellant made an application on October 18, 1954. This application was opposed both by the respondent and the Assistant Government Pleader on behalf of the State. The learned Judges who heard this application took the view that if the appellant had given the value in the first instance for purposes of jurisdiction he was precluded from giving a different value at a later stage. Accordingly it was held that Rs. 15,00,000 which had been mentioned in the plaint as the value of the appellant's claim for jurisdictional purposes should be treated as the value given by the appellant also for the purposes of Court-fees under section 7(iv) (*b*) of the Act. The result was that the application made by the appellant for a formal amendment of the valuation made in the plaint was rejected. The learned Judges also purported to exercise their jurisdiction under section 12(2) of the Act and directed that the appellant should pay deficit Court-fee on the basis of Rs. 15,00,000 not only on his memorandum of appeal but also on his plaint. It is this order which has given rise to the present appeal.

The first point which Shri Krishnaswamy Ayyangar has raised before us on behalf of the appellant is that the order passed by the learned Chamber Judge on October 18, 1951, is final under section 5 of the Act. By this order the learned Chamber Judge had held that the plaint filed in the present suit did not attract the provisions of section 7 (v) of the Act and that the proper Court-fee to be paid was determined by Article 17-B of Schedule II of the Act. Since the appellant had paid the fixed Court-fee of Rs. 100, under this latter provision, no objection could be taken on the ground that sufficient Court-fee had not been paid. If this order had really been passed under section 5 of the Act it would undoubtedly be final. Section 5 of the Act provides for procedure in case of difference as to necessity of Court-fee. In cases where a difference arises between an officer whose duty it is to see that any fee is paid under Chapter III and a suitor as to the necessity of paying the fee or the amount thereof, it has to be referred to the taxing officer whose decision thereon shall be final. This section further provides that if the taxing officer, to whom such difference is referred by the office, is of opinion that the point raised is one of general importance, he can refer the said point to the final decision of the Chief Justice of the High Court or such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf; and it is clear that if the Chief Justice or any other Judge appointed in that behalf by the Chief Justice decides the matter in question, his decision shall be final. Unfortunately, however, in the present case it has been found by the Division Bench that dealt with this matter subsequently that a search of the record did not show any general or special order which would have justified the exercise of jurisdiction under section 5 by Krishnaswamy Naidu, J. No doubt Shri Krishnaswamy Ayyangar stated before us that the practice in the Madras High Court always was to refer disputes as to proper Court-fees arising between suitors on the Original Side and the Registry to the Chamber Judge and it was always assumed, says Shri Ayyangar, that the Chamber Judge on the Original Side was a pointed generally to deal with such disputes. It is difficult for us to make any such assumption in dealing with the present suit. Unless we are satisfied from the record that Krishnaswamy Naidu, J.,

had, at the material time, been appointed either generally or specially to act under section 5, it would be difficult to accede to the argument that the order passed by him in the present proceedings is final. It is frankly conceded that the record does not show any general or special order as contemplated by section 5. That is why we must hold that the learned Judges of the Division Bench were right in refusing to attach finality to the order passed by Krishnaswamy Naidu, J.

It is then urged by Shri Krishnaswamy Ayyangar that the learned Judges were in error in purporting to exercise their jurisdiction under section 12(2) of the Act when they directed the appellant to pay additional Court-fees on the plaint on the basis of the valuation of Rs. 15,00,000. His contention is that section 12 does not apply to the appeals arising from judgments and decrees passed in suits on the Original Side of the Madras High Court. It is perfectly true that the question about the levy of fees in High Courts on their Original Sides is governed by section 3 of the Act and, if the matter had to be decided solely by reference to the Act, it would not be possible to apply any of the provisions contained in Chapter III of the Act either to the suits filed on the Original Side of the Madras High Court or to the appeals arising from judgments and decrees in such suits. But it is common ground that, on the plaints filed on the Original Side of the Madras High Court, Court-fees are leviable under the relevant provisions contained in Chapter III of the Act and the levy of these fees is authorised by Order 2, rule 1 of the High Court Fees Rules, 1933. It is, therefore, necessary to inquire what provisions of the Act have been extended to the suits filed on the Original Side. The authority and jurisdiction of the Madras High Court in enacting rule 1 of Order 2 are not in dispute. What is in dispute before us is the effect of the said rule. The appellant's case is that the said rule merely contemplates the levy of certain specified Court-fees as indicated in the provisions of the Act which are expressly made applicable to the Original Side. No other provision of the Act, according to the appellant, can be said to have been extended and so the learned Judges were in error in purporting to exercise their jurisdiction under section 12(2). We are not satisfied that this argument is well-founded. Order 2, rule 1, reads thus :

"*Order 2, rule 1 of Madras High Court Fees Rules*, 1933 :—

Order 2.

1. The fees and commissions set out in Appendix II hereto shall be charged by the Registrar, Sheriff, the Reserve Bank of India and the Imperial Bank of India, as the case may be, upon the several documents, matters and transactions therein specified as chargeable. The commission chargeable to Government shall be charged by the Reserve Bank of India and credited to Government. *(To other documents including Memoranda of appeals the Registrar shall apply so far as may be the law for the time being in force relating to Court-fees, as regards the scale of such fees, the manner of levy of such fees, the refund of such fees and in every other respect, in the manner and to the extent that it is applicable to similar documents filed in original proceedings in a District Court and in appeals from decrees and orders of a District Court.)"

It cannot be disputed that as a result of this rule, section 7 (iv) (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of the Act along with the proviso as well as Article 17-B of Schedule II of the Act applied to suits filed on the Original Side of the High Court. The latter portion of the order which has been added in 1949 obviously makes applicable to the suits and appeals on the Original Side of the High Court provisions of the Act as regards the scale of fees, the manner of their levy and the refund of fees. It also makes the relevant provisions of the Act applicable in "every other respect". The words "in every other respect" in the context clearly indicate that section 12 which confers upon the appellate Court authority or jurisdiction to examine the question about the sufficiency or otherwise of the Court-fees paid not only on the memorandum of appeal but also on the plaint in the suit which comes before the Court of appeal is obviously intended to apply. It would indeed be illogical to apply the relevant provisions of the Act for the levy of Court-fees on plaints and memoranda of appeal and not to confer jurisdiction on the appropriate Court to examine the sufficiency or otherwise of the Court-fees paid in that behalf. The

* Added by R.O.C. No. 2219 of 1949.

power to entertain claims for refund of Court-fees has been specifically mentioned. A claim for refund can be validly made, for instance in a case where excess Court-fee has been paid. That is why the provisions of sections 13, 14 and 15 had to be applied in terms. If a litigant is entitled to make a claim for refund of Court-fees in cases governed by the relevant provisions of the Act, there appears to be no reason why it should not be open to the Court to entertain the question about inadequate payment of Court-fees. Logically, if excess Court-fees paid should and can be refunded in these proceedings, inadequate or insufficient Court-fees paid can and should be dealt with on that footing and orders passed to pay the deficit Court-fees in such cases. It is matters of this kind that are clearly covered by the expression "in every other respect" to which we have just referred. We, therefore, hold that the learned Judges below were justified in assuming jurisdiction under sub-sections (1) and (2) of section 12. Section 12 consists of two parts. Sub-section (1) provides that the question about the proper payment of Court-fees on the plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum of appeal is filed. It also lays down that such decision is final between the parties to the suit. Sub-section (2) confers upon the Court of appeal, reference, or revision, jurisdiction to deal with the question of adequacy of Court-fee paid on the plaint whenever the suit in which such plaint has been filed comes before it and if the Court is satisfied that proper Court-fees have not been paid then it can pass an order requiring the party to pay so much additional fee as would have been payable if the question had been rightly decided in the first instance. Since the decision of Krishnaswamy Naidu, J., cannot attract the finality mentioned in section 5 of the Act, it was open to the Division Bench to consider the correctness of the view taken by the learned Chamber Judge; and as they were satisfied that the plaint did not fall under Article 17-B of Schedule II, they were entitled to pass appropriate orders under section 12 (1) and (2).

The appellant, however, contends that the learned Judges were in error in directing him to pay Court-fees on the basis of the value of Rs. 15,00,000 both on his plaint and on his memorandum of appeal because he argues that this decision is inconsistent with the earlier order that the proper Court-fees to be paid on the memorandum of appeal had to be determined under section 7 (iv) (*b*) of the Act. This order has been passed by the Division Bench under section 5 of the Act and it is final between the parties. This order gives the appellant leave to value his claim for the relief of partition and he exercised his option by valuing it at Rs. 50,000. The valuation thus made by the appellant in respect of the value of his relief of partition for the payment of Court-fees should and must be taken to be the valuation even for the purposes of jurisdiction and it is on this valuation alone that the appellant can be justly called upon to pay Court-fees both on the plaint and on the memorandum of appeal. The learned Judges were, therefore, in error in not allowing the appellant leave to make amendment in the plaint so as to bring the plaint in conformity with the provisions of section 7, sub-section (iv) of the Act. That in brief is the appellant's case.

On the other hand, on behalf of the Intervener—Advocate-General of Madras as well as on behalf of the respondent, it was sought to be urged before us that both the plaint and the memorandum of appeal ought to be valued for the purposes of payment of Court-fees under section 7 (v) of the Act. It is conceded that the question of Court-fees must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on the merits. The argument, however, is that if all the material allegations contained in the plaint are fairly construed and taken as a whole it would appear that the plaintiff has been ousted from the enjoyment of the properties in suit and his claim for partition in substance is a claim for possession of the suit properties and as such falls within the provisions of section 7, sub-section (*v*) of the Act. The question about proper Court-fees leviable on plaints in which Hindu plaintiffs make claims for partition under varying circumstances has given rise to several conflicting decisions in the High Courts of India. We are, however, not called upon to consider the point as to whether section 7

(v) would apply to the present suit or whether the present suit would fall under section 7 (iv) (*b*). In our opinion, the decision of the Division Bench of the Madras High Court that the memorandum of appeal should be taxed for the purposes of Court-fee under section 7 (iv) (*b*) of the Act is final under the provisions of section 5 of the Act and it cannot be re-opened at this stage. It may be that when the Division Bench of the Madras High Court considered this matter under reference made by the Master under section 5 the respondent was not heard. Normally the dispute between the litigant and the Registry in respect of Court-fees arises at the initial stage of the presentation of the plaint or the appeal and the defendant or the respondent is usually not interested in such a dispute unless the question of payment of Court-fees involves also the question of jurisdiction of the Court either to try the suit or to entertain the appeal. There is no doubt that the question about the adequacy of the Court-fees leviable on the appellant's memorandum of appeal was properly referred by the Master to the learned Chief Justice of the Madras High Court and has been decided by the Division Bench of the said High Court in pursuance of the requisite order made by the Chief Justice in that behalf. In such a case, the decision reached by the Division Bench must be held to be final under section 5 of the Act. That is why we have not allowed the merits of this order to be questioned in the present appeal. We must, therefore, deal with the appellant's contention on the basis that the Court-fees on his memorandum of appeal must be levied under section 7 (iv) (*b*) of the Act.

The question which still remains to be considered is whether the Division Bench was justified in directing the appellant to pay Court-fees both on the plaint and on the memorandum of appeal on the basis of the valuation for Rs. 15,00,000. In our opinion, the appellant is justified in contending that this order is erroneous in law. Section 7, sub-section (iv) (*b*) deals with suits to enforce the right to share in any property on the ground that it is joint family property and the amount of fees payable on plaints in such suits is " according to the amount at which the relief sought is valued in the plaint or memorandum of appeal ". Section 7 further provides that in all suits falling under section 7(iv) the plaintiff shall state the amount at which the value of the relief is sought. If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of section 7 is considered, it would be clear that, in respect of suits falling under sub-section (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of Court-fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim it is really difficult to value the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint family property. In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the Court to give him certain specified properties separately and absolutely on his own account for his share *in lieu* of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. That is why Legislature has left it to the option of the plaintiff to value his claim for the payment of Court-fees. It really means that in suits falling under section 7 (iv) (*b*) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the Court in computing the Court-fees payable in respect of the said relief. In the circumstances of this case it is unnecessary to consider whether, under the provisions of this section, the plaintiff has been given an absolute right or option to place any valuation whatever on his relief.

What would be the value for the purpose of jurisdiction in such suits is another question which often arises for decision. This question has to be decided by reading section 7 (iv) of the Act along with section 8 of the Suits Valuation Act. This latter

section provides that, where in any suits other than those referred to in Court-Fees Act, section 7, paras. 5, 6, and 9 and para. 10 clause (*d*), Court-fees are payable *ad valorem* under the Act, the value determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same. In other words, so far as suits falling under section 7, sub-section (iv) of the Act are concerned, section 8 of the Suits Valuation Act provides that the value as determineble for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. There can be little doubt that the effect of the provisions of section 8 is to make the value for the purpose of jurisdiction dependent upon the value as determinable for computation of court-fees and that is natural enough. The computation of court-fees in suits falling under section 7(iv) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court-fees, that determines the value for jurisdiction. The value for court-fees and the value for jurisdiction must no doubt be the same in such cases ; but it is the value for court-fees stated by the plaintiff that is of primary importance. It is from this value that the value for jurisdiction must be determined. The result is that it is the amount at which the plaintiff has valued the relief sought for the purposes of court-fees that determines the value for jurisdiction in the suit and not *vice versa.* Incidentally we may point out that according to the appellant it was really not necessary in the present case to mention Rs. 15,00,000 as the valuation for the purposes of jurisdiction since on plaints filed on the Original Side of the Madras High Court prior to 1953 there was no need to make any jurisdictional valuation.

The plaintiff's failure to state the amount at which he values the relief sought is often due to the fact that in suits for partition the plaintiff attempts to obtain the benefit of Article 17-B of Schedule II in the matter of payment of court-fees. Where the plaintiff seeks to pay the fixed court-fee as required by the said article, he and his advisers are apt to take the view that it is unnecessary to state the amount for which relief is sought to be claimed for the purposes of court-fees and the valuation for jurisdiction purposes alone is, therefore, mentioned. Often enough, it turns out that the plaint does not strictly attract the provisions of Article 17-B of Schedule II and that the court-fee has to be paid either under section 7 (iv) (*b*) or under section 7 (*v*) of the Act. If the Court comes to the conclusion that the case falls under section 7 (iv) (*b*) or section 7 (*iv*) (*c*) ordinarily liberty should be given to the plaintiff to amend his plaint and set out specifically the amount at which he seeks to value his claim for the payment of court-fees. It would not be reasonable or proper in such a case to hold the plaintiff bound by the valuation made by him for the purposes of jurisdiction and to infer that the said valuation should be also taken as the valuation for the payment of court-fees. In this connection we may point out that this is the view taken by the Full Bench decision of the Lahore High Court in *Karam Ilahi* v. *Muhammad Bashir*[1]. As we have already indicated section 8 of the Suits Valuation Act postulates that the plaintiff should first value his claim for the purpose of court-fee and it provides for the determination of the value for jurisdiction on the basis of such claim. In our opinion, therefore, the learned judges of the Madras High Court were in error in holding that the valuation for jurisdiction showed in the plaint should be taken to be the valuation for the payment of court-fees on the plaint as well as the memorandum of appeal. In view of their prior decision that the present case fell under section 7 (iv) (*b*), they should have allowed the appellant to amend his valuation for the payment of court-fees not only on the memorandum of appeal but also on the plaint.

We must accordingly set aside the order under appeal and direct that the plaintiff should be allowed to state the amount of Rs. 50,000 at which he values the relief sought by him for the purpose of section 7 (iv) (b) of the Act. Shri Krishnaswamy Ayyangar has orally requested us to give him liberty to make the appropriate amendment in his plaint and we have granted his request.

1. A.I.R. 1949 Lah. 116.

In the result the appeal would be allowed and the appellant directed to pay additional court-fees on his plaint on the basis of the valuation of Rs. 50,000 within two months from today. Since the appellant has already paid adequate court-fees on his memorandum of appeal, no further order need be passed in that behalf. There will be no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, B. P. SINHA, J. L. KAPUR AND A. K. SARKAR, JJ.

Raja Ganga Pratap Singh .. *Appellant**

v.

The Allahabad Bank, Ltd., Lucknow .. *Respondent.*

Civil Procedure Code (V of 1908), section 113 and Constitution of India (1950), Article 228—Validity of provision excluding debts due to scheduled bank from definition of " debt " in Uttar Pradesh Zamindar's Debt Reduction Act (XV of 1953)—Question as to raised by a party—Duty to decide question as to the validity of such provision before considering the severability or otherwise of that part of the definition.

The defence to an action on a mortgage raised the question as to the validity of the provision excluding debts due to scheduled banks from the definition of " debt " in section 2 (*f*) of the Uttar Pradesh Zamindar's Debt Reduction Act (XV of 1953). The defendant made an application to the Civil Judge under the proviso to section 113 of the Code of Civil Procedure asking him to state a case for the opinion of the High Court as to the invalidity of the impugned portion of the definition. The Civil Judge took the view that though the impugned portion of the definition infringed Article 14 of the Constitution as it made an arbitrary distinction, the offending portion was not severable from the rest of the definition and the defendant would, therefore, be in any event left without the protection of the Act. He held in this view the proviso to section 113 of the Code did not apply and dismissed the application under it. The defendant then made an application to the High Court for a revision of the order and at the same time made another application under Article 228 of the Constitution. The High Court dismissed both the applications by one judgment holding that the only dispute was whether the impugned portion of the definition of a " debt " in the Act was severable from the rest and that was not a question of the interpretation of any provision of the Constitution but one of the construction of the Act itself.

On appeal to the Supreme Court:

Held: The question of the validity of the definition in so far as it excluded certain debts having been raised and pressed by the defendant, it had to be decided by the Court. Without decision of that question the case could not be disposed of.

The fact that in the view of the Court the impugned part of the definition was not severable from the rest and therefore in any view of the question as to the validity of the impugned part, the defendant would not get any relief, did not alter the position.

The question as to the severability of the impugned part of the definition from the rest would arise only after it had been decided that the impugned part was invalid.

Appeal by Special Leave from the Judgment and Order, dated the 28th February, 1956, of the Allahabad High Court (Lucknow Bench) in Misc. Case No. 4 of 1955 and Civil Revision No. 189 of 1955 arising out of the Order, dated the 6th August, 1955, of the Civil Judge, Sitapur, in Suit No. 16 of 1953.

Vidya Sagar, Advocate for Appellant.

Iqbal Ahmad, Senior Advocate, (*S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain and Co* with him) for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The respondent, a scheduled bank, sued the appellant in the Court of the Civil Judge, Sitapore, in Uttar Pradesh, for the recovery of money due under an instrument of mortgage. The appellant contested the suit on several grounds one of which was that he was entitled to relief under the Uttar Pradesh Zamindar's Debt Reduction Act (U.P. XV of 1953) which reduced the amount recoverable on a debt as defined in it. Now a debt was defined in the Act in these terms :

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*Civil Appeal No. 357 of 1957. 22nd January, 1958.

2 (*f*).—" debt" means an advance in cash or in kind and includes any transaction which is in substance a debt but does not include an advance as aforesaid made on or after the first day of July, 1952 or a debt due to—

(i) the Central Government or Government of any State ;
(ii) a local authority ;
(iii) a scheduled bank ;
(iv) a co-operative society ; and
(v) a *waqf*, trust or endowment for a charitable or religious purpose only.
(vi) a person, where the debt was advanced on his behalf by the Court of Wards to a ward.

As the respondent was a scheduled bank the debt due to it from the appellant was not a debt within this definition and consequently, no relief would appear to be available to the appellant under the Act in respect of that debt. The appellant, however, contended that the definition in so far as it excluded certain debts offended Article 14 of the Constitution inasmuch as it made an arbitrary distinction between several classes of debtors and denied the excluded debtors, the equal protection of the law and that hence that portion of the definition which excluded certain debts was invalid and should be struck out and the rest of the definition should be left as operative. If the appellant's contention was justified, the definition would have to run as follows :

"'debt' means an advance in cash or in kind and includes any transaction which is in substance a debt,"

and would then include the debt due by the appellant to the respondent. If this was the correct position, then the appellant would be entitled to all the reliefs granted by the Act.

This defence, therefore, raised a question as to the validity of a provision in the Act. So the appellant made an application to the Civil Judge, Sitapur, under the proviso to section 113 of the Code of Civil Procedure asking him to state a case for the opinion of the High Court at Allahabad to which he was subordinate as to the invalidity of the impugned portion of the definition. That proviso is in these terms :

"Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."

The learned Civil Judge took the view that the impugned portion of the definition infringed Article 14 of the Constitution as it made an arbitrary distinction between several classes of debtors and was therefore invalid, but he held that it was not necessary for the disposal of the case to decide such question of invalidity because even if it was decided in favour of the appellant, the result would be to exclude the entire definition from the Act as the offending portion was not severable from the rest and the appellant would, therefore, be in any event left without the protection of the Act. In this view of the matter he held that the proviso to section 113 of the Code did not apply and dismissed the application under it.

The appellant then made an application to the High Court at Allahabad for a revision of the order of the learned Civil Judge. He at the same time made another application to the High Court under Article 228 of the Constitution. That article is in these terms :

"If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(*a*) either dispose of the case itself, or

(*b*) determine the said question of law and return the case to the Court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said Court shall on receipt thereof proceed to dispose of the case in conformity with such judgment,"

The appellant in the latter application prayed that the High Court might be pleased to withdraw the case and either dispose it of itself, or determine the question of the validity of the definition of debt in the Act and return the case to the Court of the Civil Judge, Sitapur, for final disposal in accordance with such determination.

The High Court disposed of both the applications by one judgment. It held that there was no dispute as to the constitutional principle which was clear, namely, that every citizen was entitled to the equal protection of the laws and that any enactment which infringed that principle, is to that extent void, and that the only dispute was whether the impugned portion of the definition of a "debt" in the Act was severable from the rest and that was not a question of the interpretation of any provision of the Constitution but one of the construction of the Act itself. The High Court also held that even if any question of the interpretation of the Constitution arose, a determination of that question was not necessary for the disposal of the case. In this view of the matter the High Court dismissed the application in revision and also that under Article 228. From this judgment the present appeal has been filed.

It seems clear to us that the question raised by the appellant in this case comes within the proviso to section 113 of the Code as also Article 228 of the Constitution. The question contemplated by the proviso to section 113 of the Code is as to the validity of an Act or of a provision in it while Article 228 of the Constitution has in view a question as to the interpretation of the Constitution. Now the question raised in the present case is as to the validity of a provision in the Zamindar's Debt Reduction Act. This question is, however, also a question as to the interpretation of the Constitution, for the validity of the provision is challenged on the ground that it contravenes an article of the Constitution.

The point that really arises in this appeal is whether it is necessary for the disposal of the case to decide the question of the validity of a portion of the definition of a debt in the Act. All other conditions necessary for an order being made under the proviso to section 113 of the Code or Article 228 of the Constitution exist and as to this there is no serious dispute. It is not necessary for us therefore to discuss these conditions.

The Courts below held that in either view of the question of the validity of the impugned portion of the definition of a debt, the appellant would be without the remedy which he sought, because that portion of the definition was not severable from the rest, and therefore it was not necessary to decide that question to dispose of the case. We are unable to agree with this view. The question of the validity of the definition in so far as it excluded certain debts having been raised and pressed by the appellant, it had to be decided by the Court. Without a decision of that question the case could not be disposed of. The fact that in the view of the Court the impugned part of the definition was not severable from the rest and therefore in any view of the question as to the validity of the impugned part, the appellant would not get any relief, did not alter the position. The question as to the severability of the impugned part of the definition from the rest would arise only after it had been decided that the impugned part was invalid and so to be able to say that the impugned part of the definition was not severable from the rest, it had first to be held that that part was invalid. It could not be said that as the impugned part was not severable from the rest it was not necessary for the disposal of the case to decide the question of the validity of the impugned part. We, therefore, hold that it is necessary to decide the question of the validity of the impugned part of the definition to dispose of the case.

This appeal is hence allowed. The High Court will withdraw the case and either dispose it of itself or determine the question of the validity of the definition of a debt in the Zamindar's Debt Reduction Act and return the case to the Civil Judge, Sitapur, for disposal in accordance with its determination of the question. The appellant will get the costs of this appeal.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, A. K. SARKAR AND VIVIAN BOSE, JJ.

Santosh Kumar .. *Appellant**

v.

Bhai Mool Singh .. *Respondent.*

Civil Procedure Code (V of 1908), Order 37, rules (2) and (3)—Leave to defend—Object of—Discretion, exercise of—Appeal, if and when lies.

The object of the rules (2) and (3) of Order 37 of the Civil Procedure Code is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce.

The discretion given to Court must be exercised along judicial lines (*i.e.*) in consonance with the principles of natural justice that form the foundation of our laws. *Sangram Singh* v. *Election Tribunal, Kotah*, (1955) 2 S.C.R. 1 (8, 9) : (1955) S.C.J. 431: (1958) 2 M.L.J. 13, followed.

Whenever the defence raises a "triable issue" leave must be given and must be given unconditionally, otherwise leave may be illusory. Once the Court is satisfied that the facts alleged by the defendant will afford a good or even a plausible answer to the plaintiff's claim, leave cannot be withheld and no question of imposing conditions can arise.

Ordinarily an appeal will not be entertained against an exercise of discretion that had been exercised along sound judicial lines; but if the discretion is exercised arbitrarily or is based on a misunderstanding of the principles governing its exercise, then interference is called for if there has been a resultant failure of justice.

Appeal by Special Leave from the Judgment and Order, dated the 17th December, 1956, of the Punjab High Court (Circuit Bench) at Delhi in Civil Misc. No. 896-D of 1956, arising out of the Judgment and Order, dated the 1st November, 1956, of the Court of Commercial Subordinate Judge, Delhi, in Suit No. 264 of 1956 under Order 37, Civil Procedure Code.

A. V. Viswanatha Sastri, Senior Advocate, (*Naunit Lal*, Advocate, with him) for Appellant.

Bakhshi Gurcharan Singh and *Sardar Singh*, Advocates for Respondent.

The Judgment of the Court was delivered by

Bose, J.—The defendants, Santosh Kumar and the Northern General Agencies, were granted special leave to appeal. The plaintiff filed the suit out of which the appeal arises on the basis of a cheque for Rs. 60,000 drawn by the defendants in favour of the plaintiff and which, on presentation to the Bank, was dishonoured.

The suit was filed in the Court of the Commercial Subordinate Judge, Delhi, under Order 37 of the Code of Civil Procedure.

The defendants applied for leave to defend the suit under rule 3 of that Order.

The learned trial Judge held that:

"the defence raised by the defendants raises a triable issue,"

but he went on to hold that the defendants

"have not placed anything on the file to show that the defence was a *bona fide* one."

Accordingly, he permitted the defendants

"to appear and defend the suit on the condition of their giving security to the extent of the suit amount and the costs of the suit."

The defendants applied for a review but failed. They then applied under Article 227 of the Constitution to the Delhi Circuit Bench of the Punjab High Court and failed again. As a result, they applied here under Article 136 and were granted special leave.

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*Civil Appeal No. 96 of 1957. 5th February, 1958.

At first blush, O. 37, rule 2 (2), appears drastically to curtail a litigant's normal rights in a Court of justice, namely to appear and defend himself as of right, if and when sued, because it says that when a suit is instituted on a bill of exchange, hundi or a promissory note under the provisions of sub-rule (1)—

> " . . . . the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend."

But the rigour of that is softened by rule 3 (1) which makes it obligatory on the Court to grant leave when the conditions set out there are fulfilled. Clause (1) runs —

> " The Court *shall*, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application."

But no sooner is the wide discretion given to the Court in rule 2 (2) narrowed down by rule 3 (1) than it is again enlarged in another direction by rule 3 (2) which says that

> "Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

The learned counsel for the plaintiff argues that the discretion so conferred by rule 3 (2) is unfettered and that as the discretion has been exercised by the learned trial Judge, no appeal can lie against it unless there is a "grave miscarriage of justice or flagrant violation of law" and he quotes *D. N. Banerji* v. *P. R. Mukherjee & Others*[1], and *Waryam Singh* v. *Amarnath*[2].

Now what we are examining here are laws of procedure. The spirit in which questions about procedure are to be approached and the manner in which rules relating to them are to be interpreted are laid down in *Sangram Singh* v. *Election Tribunal, Kotah, Bhurey Lal Baya*[3].

> " Now a code of procedure must be regarded as such. It is *procedure*, something designed to facilitate justice and further its ends ; not a penal enactment for punishment and penalties ; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both* sides) lest the very means designed for the furtherance of justice be used to frustrate it.
>
> Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

Applied to the present case, these obeservations mean that though the Court is given a discretion it must be exercised along judicial lines, and that in turn means, in consonance with the principles of natural justice that form the foundations of our laws. Those principles, so far as they touch the present matter, are well known and have been laid down and followed in numerous cases.

The decision most frequently referred to is a decision of the House of Lords in England where a similar rule prevails. It is *Jacobs* v. *Booth's Distillery Company*.[4] Judgment was delivered in 1901. Their Lordships said that whenever the defence raises a "triable issue", leave must be given, and later cases say that when that is the case it must be given unconditionally, otherwise the leave may be illusory. See, for example, *Powszechny Bank Zwiazkowy W. Polsce* v. *Paros*[5], in England and *Sundaram Chettiar* v. *Valli Ammal*[6], in India. Among other cases that adopt the "triable issue" test are *Kiranmoyee Dassi* v. *J. Chatterjee*[7], and *Gopala Rao* v. *Subba Rao*[8].

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1. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : (1953) S.C.R. 302, 305.
2. (1954) S.C.R. 565 : (1954) S.C.J. 290.
3. (1955) 2 S.C.R. 1, 8, 9 : (1955) S.C.J. 431 : (1955) 2 M.L.J. 13.
4. (1901) 85 L.T. 262.
5. L.R. (1932) 2 K.B. 353.
6. (1935) I.L.R. 58 Mad. 116 : 68 M.L.J. 16.
7. (1945) 49 C.W.N. 246.
8. A.I.R. 1936 Mad. 246 : 70 M.L.J. 241.

The learned counsel for the plaintiff-respondent relied on *Gopala Rao* v. *Subba Rao*[1], *Manohar Lal* v. *Nanhe Mal*[2], and *Shib Karan Das* v. *Mohammed Sadiq*.[3] All that we need say about them is that if the Court is of opinion that the defence is not *bona fide*, then it can impose conditions and is not tied down to refusing leave to defend. We agree with Varadachariar, J., in the Madras case that the Court has this third course open to it in a suitable case. But it cannot reach the conclusion that the defence is not *bona fide* arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter. It is unnecessary to examine the facts of those cases because they are not in appeal before us. We are only concerned with the principle.

It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan* v. *South Indian Bank Ltd.*[4], and is examined in greater detail in *Sundaram Chettiar* v. *Valli Ammal*[5], to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.

Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made, and gave the numbers of the cheques.

This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said —

> "In the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions. . . . . . ."

This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether "*if the facts alleged by the defendants are duly proved*" they will afford a good, or even a plausible, answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

The learned High Court Judge is also in error in thinking that even when the defence is a good and valid one, conditions can be imposed. As we have explained, the

1. A.I.R. (1936) Mad. 246 : 70 M.L.J. 241.
2. A.I.R. 1938 Lah. 548.
3. A.I.R. 1936 Lah. 584.
4. I.L.R. (1950) Mad. 251 : (1949) 2 M.L.J. 70.
5. (1935) I.L.R. 58 Mad. 161 : 68 M.L.J. 16.

power to impose conditions is only there to ensure that there will be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action.

We do not wish to throw doubt on those decisions which decide that ordinarily an appeal will not be entertained against an exercise of discretion that has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily, or is based on a misunderstanding of the principles that govern its exercise, then interference is called for if there has been a resultant failure of justice. As we have said, the only ground given for concluding that the defence is not *bona fide* is that the defendant did not prove his assertions before he was allowed to put in his defence; and there is an obvious failure of justice if judgment is entered against a man who, if he is allowed to prove his case, cannot but succeed. Accordingly, interference is called for here.

The appeal is allowed. We set aside the orders of the High Court and the learned trial Judge and remand the case to the first Court for trial of the issues raised by the defendants. The costs of the appellants in this Court will be paid by the respondent who has failed here.

Appeal allowed; case remanded.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

P. Balakotaiah and others .. *Appellants**

v.

The Union of India and others .. *Respondents.*

Railway Services (Safeguarding of National Security) Rules, 1949, *rule* 3—*Constitutional validity—Articles* 14, 19 (1) (*c*) *and* 311 *of the Constitution, if contravened.*

Writ petitions were filed on February 3, 1951 in Nagpur High Court challenging the validity of the notices under rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949 and the order of suspension served on the petitioners on July 6, 1950 and the petitions were amended by adding that the orders of dismissal dated April 4, 1951 were also bad. The High Court, without deciding if the Security Rules were void in contravention of Articles 14, 19 (1) (*c*) and 311 of the Constitution, 1950, sustained the orders of termination of services under rule 148 (3) and (4) of the Railway Establishment Code. Hence the appeal to Supreme Court.

Held :—1. It may be the connotation of the words "subversive activities" in rule 3 of the Security Rules is wide but that is not to say it is vague and indefinite. The object of the rules as recited in the short title is safeguarding the national security which is emphasised in the proviso to rule 3. The words "subversive actitivites in the context of national security is sufficiently precise to sustain a valid classification (*Ananthanarayan* v. *Southern Railway*, A.I.R. 1956 Mad. 220 (223), disapproved.) The Security Rules, 1949, are not illegal as being repugnant to Article 14 of the Constitution.

2. The appellants have no doubt a fundamental right to form associations under Article 19 (1) (*c*). (and be members of the Communist party and trade unions); but they have no fundamental right to be continued in employment by the State and when their services are terminated by the State they cannot complain of the infringement of any of their constitutional rights when no question of violation of Article 311 arises.

3. The terms of employment (applicable to the appellants) provide for their services being terminated on a proper notice and so no question of premature termination arises. Rule 7 of the Security Rules preserves their right to all the benefits of pension, gratuities and the like they would be entitled to under the rules. The orders terminating their services stand on the same footing as an order of discharge under rule 148 of the Railway Establishment Code and it is neither one of dismissal nor of removal so as to attract Article 311 of the Constitution.

4. The rules are clearly prospective in that action thereunder is to be taken in respect of subversive activities which either exist now or are likely to be indulged in, in future. That the materials

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* C.As. Nos. 46 to 48 of 1956. 3rd December, 1957.

for taking action in the latter case as in the notices in the instant cases are drawn from the conduct of the employees prior to the enactment does not render them retrospective.

Quaere.—Whether the Security Rules have an independent operation of their own apart from rule 148?

Appeals from the Judgment and Order dated 16th November, 1951, of the former Nagpur High Court in Misc. Petitions Nos. 45, 1568, and 1569 of 1951.

H. J. Umrigar, D.L. Jayawant and *Naunit Lal*, Advocates, for Appellant in C.A. Nos. 46 and 47 of 1956).

D.L. Jayawant and *Naunit Lal*, Advocates, for Appellant in C.A. No.48 of 1956.

R. Ganapathi Iyer and *R. H. Dhebar*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—These appeals are directed against the orders of the High Court of Nagpur dismissing the writ petitions filed by the appellants herein, and as as they arise out of the same facts and raise the same points for determination, they were heard together, and will be disposed of by a common judgment.

The facts in Civil Appeal No. 46 of 1956—the facts in the connected appeals are similar and do not require to be stated—are that the appellant was employed in 1939 in the Bengal Nagpur Railway as a clerk in the workshop at Nagpur. In 1946 when the State took over the administration of the Railway, it gave option to the employees to continue in service on the terms set out in a document dated July 5, 1946. The appellant accepted those terms and continued in service on the conditions mentioned in that document. Acting in exercise of the powers conferred by sections 241(2), 247 and 266 (3) of the Government of India Act, 1935, the Governor-General promulgated certain rules called the Railway Services (Safeguarding of National Security) Rules, 1949, hereinafter referred to as the Security Rules, and they came into force on May 14, 1949.

It will be convenient at this stage to set out the Security Rules, in so far as they are material for the purpose of these appeals, as it is the validity of these rules that is the main point for determination by us. Rules 3, 4, 5 and 7 are as follows:

3. "A member of the Railway Service who, in the opinion of the competent authority is engaged in or is reasonably suspected to be engaged in subversive activities, or is associated with others in subversive activities in such manner as to raise doubts about his reliability, may be compulsorily retired from service, or have his service terminated by the competent authority after he has been given due notice or pay in lieu of such notice in accordance with the terms of his service agreement;

Provided that a member of the Railway Service shall not be so retired or have his service so terminated unless the competent authority is satisfied that his retention in public service is prejudicial to national security, and unless, where the competent authority is the Head of a Department, the prior approval of the Governor-General has been obtained.

4. Where in the opinion of the competent authority, there are reasonable grounds for believing that a member of the Railway Service is liable to compulsory retirement from service or to have his service terminated under rule 3, it shall—

(*a*) by an order in writing, require the said member of Railway service to proceed on such leave as may be admissible to him and from such date as may be specified in the order;

(*b*) by a notice in writing inform him of the action proposed to be taken in regard to him under rule 3;

(*c*) give him a reasonable opportunity of showing cause against that action; and

(*d*) before passing a final order under rule 3, take into consideration any representation made by him in this behalf.

5. Nothing contained in the Rules in Chapter XVII of the State Railway Establishment Code, Volume I, shall apply to, or in respect of, any action taken or proposed to be taken under these rules.

7. Any person compulsorily retired from service or whose service is terminated under rule 3 shall be entitled to such compensation, pension, gratuity and/or Provident Fund benefits as would have been admissible to him under the rules applicable to his service or post on the date of such retirement or termination of service if he had been discharged from service due to the abolition of his post without any alternative suitable employment being provided."

On July 6, 1950, the General Manager of the Bengal Nagpur Railway issued a notice to the appellant under rule 3 of the Security Rules stating that in view of the facts recited, there was reason to believe that the appellant was engaged in subversive activities and calling upon him to show cause why his services should not be terminated. He was also placed under suspension from that date. On July 29, 1950, the appellant sent his explanation denying the allegations contained in the notice dated July 6, 1950. The matter was then referred to the Committee of Advisers, who held an enquiry on September 8, 1950, and after hearing the appellant found that the charges against him mentioned in the notice were true. Acting on this report, the General Manager terminated the services of the appellant on April 3, 1951, giving him one month's salary instead of notice.

Meantime, on February 3, 1951, the appellant had filed the writ petition, out of which Civil Appeal No. 46 of 1956 arises, in the High Court of Nagpur challenging the validity of the notice dated July 6, 1950, and the order of suspension following thereon. The order of dismissal dated April 3, 1951, having been passed during the pendency of this petition, the appellant had his petition amended by adding a prayer that that order also was bad. The grounds urged in support of the petition were that the Security Rules under which action was taken were in contravention of Articles 14, 19 (1) (*c*) and 311 of the Constitution, and that, in consequence, the orders passed in exercise of the powers conferred thereby were void. The respondents resisted the application on the ground that the rules in question were valid, and that the orders passed thereunder were not open to attack.

The petition was heard along with others, in which the same questions were raised, and by their judgment dated November 16, 1951, the learned Judges held that it was unnecessary to decide whether the Security Rules were void, as assuming that they were the orders terminating the services of the petitioners could be sustained under rule 148 of the Railway Establishment Code. Sub-rules (3) and (4) of rule 148 which bear on this point are as follows :

> *Rule* 148 (3) : " *Other (non-pensionable) railway servants* : The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not, however, required in cases of summary dismissal or discharge under the provisions of service agreements, retirement on attaining the age of superannuation, and termination of service due to mental or physical incapacity.
>
> ....
>
> (4) In lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the service of a Railway servant by paying him the pay for the period of notice ".

The learned Judges held that the appellants were non-pensionable railway servants within sub-rule (3), that they had been paid one month's wages instead of notice under sub-rule (4), and that, accordingly, the impugned orders were *intra vires* the powers of the respondents under rule 148, sub-rule (3). In the result, the petitions were dismissed, and the present appeals have been preferred against these orders on a certificate under Article 132 (1) and Article 133 (1) (*c*) of the Constitution.

The appellants complain that the ground on which the judgment proceeds was not put forward by the respondents in their pleadings and should not have been allowed to be taken by them, and that on the points actually in issue, it should have been held that the Security Rules were repugnant to Articles 14, 19 (1) (*c*) and 311 of the Constitution, and, therefore, void. They further contend that even if the Security Rules were valid, the orders terminating the services were not justified by them, and that further, those orders were bad for the reason that they had not been made by the competent authorities. The appellants also sought to raise the contention that the enquiry conducted by the authorities was defective, and that there was no proper hearing as provided by the rules, but we declined to hear them on that point, as that was not raised in their petitions.

The points for decision in these appeals are :

(I) Whether the orders terminating the services of the appellants can be upheld under rule 148 of the Railway Establishment Code;

(II) Whether the Security Rules are bad as infringing (*a*) Article 14, (*b*) Article 19 (1) (*c*) and (*c*) Article 311 of the Constitution;

(III) Whether the impugned orders are not valid, even according to the Security Rules; and

(IV) Whether those orders were not passed by the competent authorities.

(I) On the first question, it appears clearly from the record that the authorities purported to take action only under the Security Rules. The notice dated July 6, 1950, was avowedly issued under rule 3 of those rules. It was in the scrupulous observance of the procedure prescribed therein that the explanations of the appellants in answer to the charges were taken, and the matters were referred to the Committee of Advisers for enquiry. And above all, the orders terminating the services of the appellants, in terms, recite that they were made under rule 3 of the rules, as for example, the notice dated April 3, 1951, given to the appellant in Civil Appeal No. 46 of 1956, which runs as follows:

> "I have considered your representation to me in reply to this office letter No. Con./T/21/MP/82 dated 6th July, 1950 and am of the opinion that you are engaged and associated with others in subversive activities in such manner as to raise doubts about your reliability and am satisfied that your retention in public service is prejudicial to national security. I have decided with the prior approval of the President that your services should be terminated under rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949".

It should be added that while the appellants stated in their petitions that action had been taken against them under the Security Rules, and that those rules were *ultra vires*, the respondents did not plead that action was taken under rule 148 of the Railway Establishment Code. They only contended that the Security Rules were valid. In view of the above, the criticism of Mr. Umrigar for the appellants that the judgment under appeal proceeds on a ground which was, not merely, not in the contemplation of the authorities when they passed the orders in question, but was not even raised in the pleadings in Court, is not without substance.

It is argued that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule, and that the validity of an order should be judged on a consideration of its substance and not its form. No exception can be taken to this proposition, but it has not been the contention of the respondents at any stage that the orders in question were really made under rule 148 (3) of the Railway Establishment Code, and that the reference to rule 3 of the Security Rules in the proceedings might be disregarded as due to mistake. In the Court below, the learned Judges rested their conclusion on the ground that clause (10) of the service agreement dated July 5, 1946, provided that in respect of matters other than those specifically dealt with therein—discharge is one of such other matters—the Railway Rules applicable to persons appointed on or after October 1, 1946, were applicable, that rule 148 (3) was one of such rules, and that the appellants who were non-pensionable railway servants were governed by that rule, and were liable to be discharged in accordance therewith. But this reasoning ignores that under clause (10) of the service agreement, the Security Rules stand on the same footing as the rules in the Railway Establishment Code and constitute equally with rule 148 the conditions of service on which the appellants held the employment, and there must be convincing reasons why orders passed statedly under rule 3 should be held not to have been passed under that rule. Before us, a different stand was taken by the respondents. They did not dispute that the action was really taken under rule 3 of the Security Rules, but they argued that the power to terminate the service under rule 3 was not something different from and independent of the power to discharge, conferred by rule 148, and that an order passed under rule 3 was, on its own terms, one made under rule 148 (3). The basis for this contention

is the provision in rule 3 that the service may be terminated in accordance with the service agreement, after giving due notice or pay in lieu of such notice.

The appellants controvert this position. They contend that the power to terminate the service under the Security Rules is altogether different from the power to discharge under rule 148, that the reference in rule 3 to the service agreement is only in respect of the notice to be given, there being different periods fixed under the rules in relation to different classes of employees, and that, in other respects, the Security Rules run on their own lines, and that action taken thereunder cannot be shunted on to rule 148.

We find considerabale difficulty in acceding to the argument of the respondents. The Security Rules apply to a special class of employees, those who are engaged or are likely to engage in subversive activities, and in conjunction with the instructions which were issued when they were promulgated, they form a self-contained code prescribing a special and elaborate procedure to be followed, when action is to be taken thereunder. We see considerable force in the contention of the appellants that the mention of the service agreement in rule 3 has reference only to the nature of the notice to be given. If the interpretation which the respondents seek to put on the Security Rules is correct, then it is difficult to see what purpose at all they serve. Mr. Ganapathy Iyer for the respondents argued that they are intended to afford protection to persons who might be charged with being engaged in subversive activities. If that is their purpose, then if action is taken thereunder but the procedure prescribed therein is not followed, the order must be held to be bad, as the protection intended to be given has been denied to the employee, and rule 148 cannot be invoked to give validity to such order. Indeed, that has been held in *Sambandam* v. *General Manager, S.I. Railway*[1], and *Prasadi* v. *Works Manager, Lilloaoh*[2], and that is also conceded by Mr. Ganapathy Iyer. If then the power to terminate the service under the Security Rules is different from the power to discharge under rule 148 when the procedure prescribed therein is not followed, it must be equally so when, as here, it has been followed, for the complexion of the rules cannot change according as they are complied with or not. That means that the Security Rules have an independent operation of their own, quite apart from rule 148. We do not, however, desire to express any final opinion on this question, as Mr. Ganapathy Iyer is willing that the validity of the orders in question might be determined on the footing that they were passed under rule 3 of the Security Rules, without reference to rule 148. That renders it necessary to decide whether the Security Rules are unconstitutional, as contended by the appellants.

(II-a) The first ground that is urged against the validity of the Security Rules is that they are repugnant to Article 14. It is said that these rules prescribe a special procedure where action is proposed to be taken against persons suspected of subversive activities, and that when the services of an employee are terminated under these rules, the consequence is to stamp him as unreliable and infamous, and there is thus discrimination, such as is hit by Article 14. It is admitted that if the persons dealt with under these rules form a distinct class having an intelligible differentia which bears a reasonable relation to the purposes of the rules, then there would be no infringement of Article 14. But it is argued that the expression "subversive activities" which forms the basis of the classification is vague and undefined in that even lawful activities could be roped therein, and that such a classification cannot be said to be reasonable. Reference was made to the charges which were served on the appellant in Civil Appeal No. 46 of 1956 as showing how even lawful activities could be brought under the impugned rules. The notice, so far as it is material, runs as follows :

"Whereas in the opinion of the......General Manager, you are reasonably suspected to be a member and office secretary of the B.N. Rly. Workers' Union (Communist sponsored) and were thickly associated with Communists such as Om Prakash Mehta, B.N. Mukherjee, R.L. Reddi, etc

1. (1952) 1 M.L.J. 540 : I.L.R. (1953) Mad. 229.
2. A.I.R. 1957 Cal. 4.

in subversive activities in such manner as to raise doubts about your reliability and loyalty to the State in that, though a Government employee, you attended private meetings of the Communists, carried on agitation amongst the Railway workers for a general strike from November, 1948 to January, 1949 evidently to paralyse communication and movement of essential supplies and thereby create disorder and confusion in the country and that, consequently, you are liable to have your services terminated under rule 3 of the said Rules".

It is argued that it is not unlawful to be a member of the Communist Party or to engage in trade union activities, and if this could form the basis of action under the rules, the classification must be held to be unreasonable. Reliance was placed on the decision of this Court in *The State of West Bengal* v. *Anwar Ali Sarkar*[1], wherein it was held that a power conferred on the executive to select cases for trial by special Courts under a procedure different from that of the ordinary Courts with the object of ensuring "speedy trial" could not be upheld under Article 14 as a valid classification, and on the decision of the Madras High Court in *Ananthanarayanan* v. *Southern Railway*[2], wherein it was held that the words "subversive activities" in Rule 3 lacked definiteness.

Now, the principles applicable for a determination whether there has been a proper and valid classification for purposes of Article 14 have been the subject of consideration by this Court in a number of cases, and they were stated again quite recently in *Budhan Chowdhry and others* v. *The State of Bihar*[3], and there is no need to repeat them. The only point that calls for decision in these appeals is whether the classification of persons on the basis of subversive activities is too vague to be the foundation of a valid classification. Mr. Umrigar insists that it is, but his elaborate argument amounts to no more than this that the expression "subversive activities" may take in quite a variety of activities, and that its contents are therefore wide. It may be that the connotation of that expression is wide, but that is not to say that it is vague or indefinite. But whatever the position if the words "subversive activities" had stood by themselves, they are sufficiently qualified in the Security Rules to be definite. Those rules have, for their object, the safeguarding of national security as recited in the short title. That is again emphasised in rule 3, which provides that a member of the Railway service is not to be retired or his services terminated unless the authorities are satisfied "that his retention in public service is prejudicial to national security". In our judgment, the words "subversive activities" in the context of national security are sufficiently precise in their import to sustain a valid classification. We are unable to agree with the opinion expressed in *Ananthanarayanan* v. *Southern Railway*[2] at page 223 that the language of rule 3 is indefinite, even when read with the words "national security."

We are also unable to agree with the argument of the appellants based on the charges made against the appellant in Civil Appeal No. 46 of 1956 in the notice dated July 6, 1950, that the expression "subversive activities" is wide enough to take in lawful activities as well, and must therefore be held to be unreasonable for purposes of classification under Article 14. The notice, it is true, refers to the appellant being a member of the Communist Party and to his activities in the trade union. It is also true that it is not unlawful to be either a Communist or a trade unionist. But it is not the necessary attribute either of a Communist or a trade unionist that he should indulge in subversive activities, and when action was taken against the appellant under the rules, it was not because he was a Communist or a trade unionist, but because he was engaged in subversive activities. We hold that the Security Rules are not illegal as being repugnant to Article 14.

(II-b). It is next contended that the impugned orders are in contravention of Article 19 (1) (*c*), and are therefore void. The argument is that action has been taken against the appellants under the rules, because they are Communists and trade unionists, and the orders terminating their services under rule 3 amount, in substance, to a denial to them of the freedom to form associations, which is guaranteed under Article 19 (1) (*c*). We have already observed that that is not the true scope of the

1. (1952) S.C.J. 55 : (1952) S.C.R. 284.
2. A.I.R. 1956 Mad. 220.
3. (1955) S.C.J. 163 ; (1955) 1 S.C.R. 1045 (1049).

charges. But apart from that, we do not see how any right of the appellants under Article 19 (1) (c) has been infringed. The orders do not prevent them from continuing to be Communists or trade unionists. Their rights in that behalf remain after the impugned orders precisely what they were before. The real complaint of the appellants is that their services have been terminated ; but that involves, apart from Article 311, no infringement of any of their Constitutional rights. The appellants have no doubt a fundamental right to form associations under Article 19 (1) (c), but they have no fundamental right to be continued in employment by the State, and when their services are terminated by the State they cannot complain of the infringement of any of their Constitutional rights, when no question of violation of Article 311 arises. This contention of the appellants must also be rejected.

(II-c) It is then contended that the procedure prescribed by the Security Rules for the hearing of the charges does not satisfy the requirements of Article 311 and that they are, in consequence, void. But Article 311 has application only when there is an order of dismissal or removal, and the question is whether an order terminating the services of the employees under rule 3 can be said to be an order dismissing or removing them. Now, this Court has held in a series of decisions that it is not every termination of the services of an employee that falls within the operation of Article 311, and that it is only when the order is by way of punishment that it is one of dismissal or removal under that Article. Vide *Satish Chandra Anand* v. *Union of India*[1], *Shyam Lal* v. *The State of Uttar Pradesh and the Union of India*[2], *State of Bombay* v. *Saubhagchand M. Doshi*[3], and *Parshotam Lal Dhingra* v. *Union of India*[4]. The question as to what would amount to punishment for purposes of Article 311 was also fully considered in *Parshotam Lal Dhingra's case*[4]. It was therein held that if a person had a right to continue in office either under the service rules or under a special agreement, a premature termination of his services would be a punishment. And, likewise, if the order would result in loss of benefits already earned and accrued, that would also be punishment. In the present case, the terms of employment provide for the services being terminated on a proper notice, and so, no question of premature termination arises. Rule 7 of the Security Rules preserves the rights of the employee to all the benfits of pension, gratuities and the like, to which they would be entitled under the rules. Thus, there is no forfeiture of benefits already acquired. It was stated for the appellants that a person who was discharged under the rules was not eligible for re-employment, and that that was punishment. But the appellants are unable to point to any rule imposing that disability. The order terminating the services under rule 3 of the Security Rules stands on the same footing as an order of discharge under rule 148, and it is neither one of dismissal nor of removal within the meaning of Article 311. This contention also must be overruled.

(III) It is next contended by Mr. Umrigar that the charges which were made against the appellant in Civil Appeal No. 46 of 1956 in the notice, dated July 6, 1950, have reference to events which took place prior to the coming into force of the Security Rules, which was on May 14, 1949, and that the order terminating the services of the appellant based thereon is bad as giving retrospective operation to the rules, and that the same is not warranted by the terms thereof. Now, the rules provide that action can be taken under them, if the employee is engaged or is reasonably suspected to be engaged in subversive activities. Where an authority has to form an opinion that an employee is likely to be engaged in subversive activities, it can only be as a matter of inference from the course of conduct of the employee, and his antecedents must furnish the best materials for the same. The rules are clearly prospective in that action thereunder is to be taken in respect of subversive activities which either now exist or are likely to be indulged in, in future, that is to say, which are *in esse* or *in posse*. That the materials for taking action in the latter case are drawn from the conduct of the employees prior to the enactment of the rules does not render their

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1. (1953) S.C.J. 323 : (1953) S.C.R. 655.
2. (1954) 1 M.L.J. 730 : (1954) S.C.J. 493 : (1955) 1 S.C.R. 26.
3. Since reported in (1958) S.C.J. 161.
4. Since reported in (1958) S.C.J. 217.

operation retrospective. *Vide* the observations of Lord Denman, C.J., in *The Queen v. St. Mary, Whitechapel*[1], and *The Queen* v. *Christchurch*[2]. This contention must also be rejected.

(IV) Lastly, it was contended that the impugned orders were not passed by the competent authorities under the Security Rules, and that they were, therefore, void. This contention is based on the fact that the authority competent to pass the orders under rule 3 is, as regards the present appellants, the General Manager, and that the impugned orders were actually communicated to them by the Deputy Manager. But it has been found as a fact that the orders had been actually passed by the General Manager, and that finding must be accepted.

In the result, the appeals fail, and are dismissed with costs. The appellants who were permitted to file the appeals *in forma pauperis* will also pay the Court-fees payable to the Government.

Appeal dismissed.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

Khem Chand .. *Appellant**

v.

The Union of India and Others .. *Respondents.*

Constitution of India (1950), *Article* 311 (2)—*Construction and scope—Further opportunity to show cause against the punishment proposed.*

The protection provided by the rules, like rule 55 of the Civil Services (Classification, Control and Appeal) Rules, together with an additional opportunity embodied in section 240 (3) of the Government of India Act, 1935, so as to give a statutory protection to the Government servants has now been incorporated in Article 311 (2) of the Constitution so as to convert the protection into a Constitutional safeguard.

The reasonable opportunity of showing cause against the action proposed includes—

(*a*) an opportunity to deny his guilt and establish his innocence which he can do only if he is told what the charges levelled against him are and the allegations on which the charges are based ;

(*b*) an opportunity to defend himself by cross-examining the witness produced against him and by examining himself or any other witnesses in support of his defence ; and finally

(*c*) an opportunity to make his representations as to why the proposed punishment should not be inflicted on him which he can only do if the competent authority after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to him.

In the instant case, the competent authority—the Deputy Commissioner—accepted the report of Shri J. B. Tandan, the officer who enquired into the charges against the appellant, found him guilty of all the charges and suggested that dismissal should be the proper form of punishment in the case and confirmed the suggestion as to the punishment proposed. Without giving the appellant the further opportunity to show cause against the dismissal proposed, the order of dismissal was passed.

Held, Article 311 (2) has not been fully complied with and the appellant has not had the benefi of all the constitutional protection ; accordingly his dismissal cannot be supported.

Appeal by Special Leave from the Judgment and Decree dated the 1st November, 1955, of the Punjab High Court (Circuit Bench) at Delhi in Regular Second Appeal No. 28-D of 1955, arising out of the Judgment and Decree dated the 31st day of December, 1954 of the Court of the Senior Subordinate Judge at Delhi in Regular Civil Appeal No. 685 of 1954 affirming the Judgment and Decree of Subordinate Judge, Third Class, Delhi, in Suit No. 273/213 of 1953.

Janardhan Sharma, Advocate, for Appellant.

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1. (1848) 12 Q.B. 120 ; 116 E.R. 811.
2. (1848) 12 Q.B. 149 : 116 E.R. 823, 825.

* C.A. No. 353 of 1957. 13th December, 1957.

C. K. Daphtary, Solicitor-General of India (*R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates, with him) for Respondents.

The Judgment of the Court was delivered by

Das, C.J.—This appeal by Special Leave granted by this Court to the plaintiff-appellant is directed against the judgment and decree passed on November 1, 1955, by a Single Judge of the Punjab High Court sitting in the Circuit Bench at Delhi in regular second appeal No. 28-D of 1955.

The facts leading up to the present appeal are shortly as follows: On April 6, 1943, the appellant was appointed a sub-inspector under the Delhi Audit Fund. In February, 1947, he was transferred to the Co-operative Societies Department and posted as sub-inspector in the Milk Scheme. On July 3, 1947, the appellant was confirmed by the then Deputy Commissioner of Delhi who was also the *ex officio* Registrar of Co-operative Societies. On August 1, 1948, the appellant was transferred to the Rehabilitation Department of the Co-operative Societies and posted as sub-inspector. On July 1, 1949, the appellant was suspended by the then Deputy Commissioner, Delhi. On July 9, 1949, the appellant was served with a charge-sheet under rule 6 (1) of the Rules which had been framed by the Chief Commissioner, Delhi, to provide for the appointment to the subordinate services under his administrative control and the discipline and rights of appeal of members of those services. After formulating eight several charges the document concluded as follows:

"You are therefore, called upon to show cause why you should not be dismissed from the service. You should also state in your reply whether you wish to be heard in person or whether you will produce defence. The reply should reach the Assistant Registrar, Co-operative Societies Delhi, within ten days from the receipt of this charge-sheet".

The charge-sheet was signed by Shri Rameshwar Dayal who was at that time the Deputy Commissioner of Delhi and was admittedly the authority competent to dismiss the appellant.

The appellant duly submitted his explanation in writing. One Shri Mahipal Singh, Inspector, Co-operative Societies was appointed by the Deputy Commissioner, Delhi, the officer to hold the enquiry. The appellant attended two sittings before the Enquiry officer and then applied to the Deputy Commissioners to entrust the enquiry to some Gazetted Officer under him. This request of the appellant was rejected and he was informed accordingly. Indeed, the appellant was warned that the Enquiry Officer had been authorised to proceed with the enquiry *ex parte* if the appellant failed to attend the enquiry. The appellant, however, did not, after October 20, 1949, attend any further sitting before the Enquiry Officer. The Enquiry Officer thereupon framed four additional charges against the appellant, namely, (1) for his refusal to attend the enquiry; (2) for his refusal to accept the service of the order of the Enquiry Officer, (3) for his absence without permission and (4) for his misconduct in snatching away papers from one Mohd. Ishaq and using unparliamentary and threatening language.

It appears that at or about this time the appellant became involved in a criminal case on a charge under section 307 of the Indian Penal Code and on October 30, 1949 he was actually arrested but was released on bail two or three days later. Eventually on May 20, 1950, the appellant was discharged from the criminal charge.

On November 14, 1951, the appellant was served with a notice signed by one Shri Vasudev Taneja, Superintendent. The notice was in the following terms:

'Please note that you are to appear before Shri J. B. Tandon, I.A.S., Additional District Magistrate, on the 24th November, 1951, at 10-30 A.M., in his Court room in connection with the departmental enquiry pending against you".

The language employed in the notice does lend some support to the contention that the Enquiry Officer, Shri Mahipal Singh, had not concluded the enquiry entrusted to him and that the departmental enquiry was still pending.

Pursuant to the notice the appellant appeared before Shri J. B, Tandon and urged two points, namely (1) that the enquiry of the charges framed against him

ought to have been held by a Gazetted Officer of the District Court and (2) that the enquiry should have been held in his presence. It will be noticed that both the points related to the enquiry before Shri Mahipal Singh. On December 13, 1951, Shri J. B. Tandon made a report. After reciting the charge-sheet containing the notice calling upon the appellant to show cause why he should not be dismissed from service and setting out the charges contained in the notice and summarising the explanation submitted by the appellant with regard to each of the charges and reciting the prayer of the appellant that the Enquiry Officer should be changed and the rejection thereof and the framing of additional charges and the appellant's absence from the enquiry with effect from October 20, 1949, the report proceeded to set out the actual charges which Shri Mahipal Singh was appointed to enquire into. The report then stated that the enquiry with regard to the first two charges had been held in the presence of the appellant and the rest were enquired into *ex parte* as the appellant had absented himself from the enquiry. Then the report recited that twelve charges had been proved against the appellant and he was given the benefit of doubt in respect of charge No. (iii) and that no charge-sheet had been given with regard to charges Nos. (xiii) and (xiv) and that no enquiry had been held on those charges. Out of the twelve charges said to have been proved against the appellant, Shri J. B. Tandon found that no charge had been actually framed in one case and, therefore, he reduced the number of proved charges to eleven and proceeded to base his recommendation on them. After stating that the charges of embezzlement, acceptance of illegal gratification and borrowing of money from societies were so serious that even one of them alone was sufficient to demand the appellant's dismissal and that the entries made in his character roll disclosed that his work and conduct had not been satisfactory and explaining that the enquiry had been held up by reason of the appellant having been challaned under section 307, Indian Penal Code, Shri J. B. Tandon, in his report, formulated the following points for consideration: namely (1) what penalty should be imposed on Shri Khem Chand for the eleven charges proved against him? (2) Whether his gun licence should be cancelled and (3) whether the dues of societies, which had been proved, might be realised out of the security deposit furnished by him? Then, after stating that a personal hearing was given to the appellant who raised the two points mentioned above and holding that there was no substance in either of them, paragraph 16 of the report ran as follows:

"The charges of embezzlement, acceptance of illegal gratification, making wrong statement, misbehaviour at the time of enquiry and refusal to receive orders to attend enquiry which had been proved against him are so serious that, I am sorry, I cannot suggest lesser punishment than dismissal from service and he may be dismissed".

The report also recommended that the appellant's gun licence be cancelled and that he be directed to surrender his licence and deposit the gun in the district Malkhana and that the money, which had been proved to have been taken by the appellant from various societies, might also be recovered from the security deposit furnished by him. There is no positive and definite statement in Shri J. B. Tandon's report that Shri Mahipal Singh had concluded the enquiry or submitted a formal report. The general tenor of Shri J. B. Tandon's report, however, suggests that Shri Mahipal Singh did arrive at definite findings on twelve charges. The appellant's grievance is that he was not given a copy of the report of Shri Mahipal Singh, if any had been made, and no such report has been exhibited in this case.

At the foot of Shri J. B. Tandon's report the following endorsement appears over the signature of the Deputy Commissioner, Delhi, under date December, 14, 1951: "The report is approved. Action accordingly." Thereupon on December 17, 1951, a formal order was issued over the signature of the Deputy Commissioner, Delhi. It was in the following terms:—

"I, the undersigned, do hereby dismiss Shri Khem Chand, Sub-Inspector, Co-operative Societies, Delhi, from the Government Service with effect from the date of this order. He has been found guilty of the charges of embezzlement, acceptance of illegal gratification, making wrong statement, misbehaviour at the time of the enquiry and refusal to receive order to attend the enquiry. I further

order that money which has been proved to have been taken by Shri Khem Chand from various societies be recovered from the security deposit furnished by him".

On March 15, 1952, the appellant appealed to the Chief Commissioner, but his appeal was dismissed on December 8, 1952. Thereafter the appellant served a notice of suit on the respondents under section 80 of the Code of Civil Procedure and on May 21, 1953, filed Civil Suit No. 213 of 1953 complaining, *inter alia*, that Article 311 (2) had not been complied with. The suit was decreed by the Subordinate Judge, Delhi, on May 31, 1954, declaring that the plaintiff's dismissal was void and inoperative and that the plaintiff continued to be in the service of the State of Delhi at the date of the institution of the suit and awarding costs to the plaintiff. The Union of India preferred an appeal against the judgment of the subordinate Judge, Delhi, but the appeal was dismissed by the Senior Subordinate Judge, Delhi on December 21, 1954, and the decree of the trial Court was confirmed. A second appeal was taken by the defendants to the Punjab High Court. By his judgment dated November 1, 1955, the Single Judge held that there had been a substantial compliance with the provisions of Article 311 and accordingly accepted the appeal, set aside the decree of the Courts below and dismissed the plaintiff's suit. On September 6, 1956, the plaintiff obtained Special Leave from this Court and has preferred this appeal against the order of the learned Single Judge. The appellant has also been allowed to prosecute the appeal *in forma pauperis*.

In the Courts belowa point was raised as to whether the appellant was a member of any of the services referred to in Article 311. But it was conceded before the High Court and has also been admitted before us that the appellant was such a member and consequently that point does not arise. The only point that has been canvassed before us, as it had been before the High Court, is: Was the appellant given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him?

There is no dispute that the appellant was served with a charge-sheet on July 9, 1949, as required by rule 6 of the rules which had been framed by the Chief Commissioner, Delhi and which governed the appellant's conditions of service. It is also conceded that the appell nt actually appeared at two hearings before the Enquiry Officer, Shri Mahipal Singh, but that subsequently he wanted a transfer of the enquiry to some other officer and that that prayer having been refused he did not take any further part in the enquiry before that officer. There is no grievance that no opportunity had been given to him to defend himself against the charges levelled against him in that enquiry. It is also an admitted fact that sometime after the appellant was discharged from the criminal case, he received a notice on November 14, 1951, requiring him to appear before Shri J.B.Tandon on November 25, 1951, in connection with the pending enquiry. The appellant did appear on the appointed day, had been given a personal hearing and in fact raised two several objections against the enquiry held by Shri Mahipal Singh. His only grievance is that, after Shri J. B. Tandon had made his report on December 13, 1951, recommending the dismissal of the appellant and the Deputy Commissioner had on the very next day approved of the report and proposed to take action accordingly the appellant was not given an opportunity to show cause against the action so proposed to be taken in regard to him, as he was entitled to under Article 311 of the Constitution.

In order to appreciate the arguments advanced by learned counsel for the parties,it is necessary at this stage to set out the provisions of the Constitution bearing on them. The relevant portions of Articles 310 and 311 of the Constitution, which substantially reproduce sub-sections (1), (2) and (3) of section 240 of the Government of India Act, 1935, are as follows :—

"310 (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State,

(2) ....

311 (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided ....

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final".

The answer to the question canvassed before us depends on a true construction of the aforesaid provisions and in particular on the view we take as to the meaning, scope and ambit of Article 311(2). In *Parshotam Lal Dhingra's case*[1], it was said that the word "removed" was not in section 240 (3) but had been introduced in Article 311(2). It may be mentioned that although the word "removed" was not actually used in section 240(3), the reference to dismissal, according to section 277, included a reference to removal.

Article 310(1) no doubt provides that every person falling within it holds office during the pleasure of the President or the Governor, as the case may be. The language of both clauses (1) and (2) of Article 311 are prohibitory in form and was held by the Judicial Committee in *High Commissioner for India* v. *I. M. Lal*[2], to be inconsistent with their being merely permissive and consequently those provisions have to be read as qualifications or provisos to Article 310(1) as has been held by the Judicial Committee in that case and recently by this Court in *Parshotam Lal Dhingra* v. *The Union of India*[1], in a judgment pronounced on November 1, 1957. The limitations thus imposed on the exercise of the pleasure of the President or the Governor in the matter of the dismissal, removal or reduction in rank of Government servants constitute the measure of the constitutional protection afforded to the Government servants by Article 311 (2).

Clause (1) of Article 311 is quite explicit and protects Government servants of the kinds referred to therein by providing that they cannot be dismissed, or removed or reduced in rank by a lesser authority than that which appointed them. Likewise clause (2) protects government servants against being dismissed, removed or reduced in rank without being given a reasonable opportunity to show cause against the action proposed to be taken in regard to them. As has been explained by this Court in *Parshotam Lal Dhingra's case*[1], the 'expressions dismissed' removed and 'reduced in rank' are technical words taken from the service rules where they are used to denote the three major categories of punishments.

In exercise of powers conferred by section 96-B (2) of the Government of India Act, 1915, the Secretary of State in Council framed Civil Service (Governors Provinces Classification) Rules. Rules (x) and (xiii) of those Rules provided that local Government might, for good and sufficient reasons, inflict the several punishments therein mentioned on persons therein indicated. Rule (xiv) prescribed the procedure for all cases in which dismissal, removal or reduction in rank of any officer was intended to be ordered. These rules were reproduced with some modifications in the Civil Services (Classification, Control and Appeal) Rules which were, on May 27, 1930, promulgated by the Secretary of State in Council in exercise of the same powers under section 96-B of the Government of India Act, 1915. Rule 49 of those rules specified seven different kinds of punishments which could, for good and sufficient reasons, be imposed upon the members of the services therein specified. Rule 55 reproduced old rule (xiv) with greater details. It provided :

1. Civil Appeal No. 65 of 1957, decided on November 1, 1957. Since reported in (1958) S.C.J. 217.

2. (1948) 2 M.L.J. 55 : (1948) L.R. 75 I.A. 225 at 241 : 1948 F.C.R. 44.

"Without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court or by a Court-Martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the person charged, together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

Similar rules were framed and are to be found in the Indian Railway Establishment Code which governs the railway servants. Rule 6 of the Rules framed by the Chief Commissioner, Delhi, referred to above, is more or less on the same lines.

In *R. Venkata Rao* v. *Secretary of State for India*[1], it was held, with reference to the rules made under section 96-B of the Government of India Act, 1915, that while that section assured that the tenure of office, though at pleasure, would not be subject to capricious and arbitrary action, but would be regulated by the rules, it gave no right to the appellant, enforceable by action, to hold his office in accordance with those rules. It was held that section 96-B and the rules made thereunder only made provisions for the redress of grievances by administrative process. The position of the Government servant was, therefore, rather insecure, for his office being held during the pleasure of the Crown under the Government of India Act, 1915, the rules could not override or derogate from the statute and the protection of the rules could not be enforceable by action so as to nullify the statute itself. The only protection that the Government servants had was that, by virtue of section 96-B (1) they could not be dismissed by an authority subordinate to that by which they were appointed. The position, however, improved to some extent under the 1935 Act which, by section 240 (3) gave a further protection, in addition to that provided in section 240 (2) which reproduced the protection of section 96-B (1) of the Government of India Act, 1915. We have, therefore, to determine the true meaning, scope and ambit of this new protection given by section 240 (3) of the Government of India Act, 1935, which has been reproduced in Article 311(2).

The majority of the Judges of the Federal Court (Spens, C.J. and Zafarulla Khan, J.) in *I. M. Lall's case*[2], took the view that in sub-section (3) of section 240 there had been enacted provisions of a very limited scope in permanent statutory form, as compared with the provisions under the rules considered in *Venkata Rao's case*[1]. Further down, after referring to the fact that prior to 1935 a sort of protection for the servants of the Crown provided by sub-section (3) was merely to be found in the rules, many and various and liable to change, their Lordships proceeded to state that from those rules had been picked out and enacted in the section itself certain limited specific provisions only. The majority of the Federal Court at page 138 construed section 240 (3) as follows:

"In our judgment the words "against the action proposed to be taken in regard to him" require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon. It should be noted that the sub-section does not require any inquiry, any formulation of charges, or any opportunity of defence against those charges. All that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him. It is also significant that

1. (1937) 1 M.L.J. 529 : (1936) L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532.

2. (1945) 2 M.L.J. 270 : (1945) F.L.J. 129 : 1945 F.C.R. 103, 136.

there is no indication as to the authority by whom the action is to be proposed. It does, however, seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notifications of the action proposed but of the grounds on which the authority is proposing that the action should be taken, and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank."

The above passage indicates that in the view of the majority of the Judges of the Federal Court section 240 (3) corresponding now to Article 311(2) does not

> "require any inquiry, any formulation of charges or any opportunity to defend against those charges".

According to them

> "all that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him".

Their Lordships added that as that opportunity had to be a reasonable opportunity the section must be taken to require :

> "not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonbale time to make his representations against the proposed action and the grounds on which it is proposed to be taken".

It is quite clear that the majority of the Federal Court put a some what narrow interpretation on the relevant provision in that they considered that the requirement of reasonable opportunity contemplated by it arose only at a later stage when the competent authority definitely proposed to take a particular action and that this opportunity did not cover the earlier stage where charges were formulated and enquired into.

Varadachariar, J., in his dissenting judgment took much the same view on this point as did the High Court. The High Court observed as follows :

> "The plaintiff's contention is that this opportunity should have been afforded to him after the finding of the enquiring officer had been considered and the punishment decided upon. With this contention we are unable to agree. Eight charges were served on the plaintiff and at the end he was asked to show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government Rules and conduct unbecoming to the Indian Civil Service. He was aware from the very start of the enquiry against him that removal from service was one of the various actions that could have been taken against him in the event of some or all the charges being established and in this sense he was showing cause during the course of the inquiry against the action proposed. The plaintiff's contention that there should be two enquiries the first to establish that he had been guilty and the second to determine what should be the appropriate punishment and that in each stage he should have reasonable and independent opportunities to defend and show cause does not appear to be correct or intended by the Legislature[1]".

In agreement with the High Court Varadachariar, J., held that the requirements of sub-section (3) of section 240 demanded nothing beyond what was required for compliance with the provisions of rule 55 of the Civil Services (Classification, Control and Appeal) Rules. His Lordship found nothing in the language

1. (1944) I.L.R. 25 Lah. 325, 347, 348.

of clause (3) to indicate that anything more or anything different was contemplated or to suggest that a further opportunity was to be given after the enquiry had been completed in the presence of the officer charged and the enquiring officer had made his report. The learned Judge was unable to accept the suggestion that the words of the statute were appropriate only to the stage when the authorities would be in a position to indicate definitely what action they intended to take, namely, whether it was to be one of dismissal or one of reduction and that this could be predicated only after the Enquiring officer had made his report.

In our judgment neither of the two views can be accepted as a completely correct exposition of the intendment of the provisions of section 240 (3) of the Government of India Act, 1935, now embodied in Article 311 (2) of the Constitution. Indeed the learned Solicitor-General does not contend that this provision is confined to guaranteeing to the government servant an opportunity to be given to him only at the later stage of showing cause against the punishment proposed to be imposed on him. We think that the learned Solicitor-General is entirely right in not pressing for such a limited construction of the provisions under consideration. It is true that the provision does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable one. In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the government servant should have the opportunity to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. Both these pleas have a direct bearing on the question of punishment and may well be put forward in showing cause against the proposed punishment. If this is the correct meaning of the clause, as we think it is, what consequences follow? If it is open to the government servant under this provision to contend, if that be the fact, that he is not guilty of any misconduct then how can he take that plea unless he is told what misconduct is alleged against him? If the opportunity to show cause is to be a reasonable one it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defence. If the purpose of this provision is to give the government servant an opportunity to exonerate himself from the charge and if this opportunity is to be a reasonable one he should be allowed to show that the evidence against him is not worthy of credence or consideration and that he can only do if he is given a chance to cross-examine the witnesses called against him and to examine himself or any other witness in support of his defence. All this appears to us to be implicit in the language used in the clause, but this does not exhaust his rights. In addition to showing that he has not been guilty of any misconduct so as to merit any punishment, it is reasonable that he should also have an opportunity to contend that the charges proved against him do not necessarily require the particular punishment proposed to be meted out to him. He may say, for instance, that although he has been guilty of some misconduct it is not of such a character as to merit the extreme punishment of dismissal or even of removal or reduction in rank and that any of the lesser punishments ought to be sufficient in his case.

To summarise: the reasonable opportunity envisaged by the provision under consideration includes—

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(*c*) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

In short the substance of the protection provided by rules, like rule 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in section 240 (3) of the Government of India Act, 1935 so as to give a statutory protection to the government servants and has now been incorporated in Article 311(2) so as to convert the protection into a constitutional safeguard.

We find support for our abovementioned conclusion in the judgment of the Judicial Committee in *I. M. Lall's case*[1]. It is true that after quoting a portion of the passage from the judgment of the majority of the Federal Court set out above their Lordships at page 242 stated that they agreed with the view taken by the majority of the Federal Court, but their Lordships did not stop there and went on to say :

> " In their opinion, sub-section (3) of section 240 was not intended to be, and was not, a reproduction of rule 55, which was left unaffected as an administrative rule. Rule 55 is concerned that the civil servant shall be informed " of the grounds on which it is proposed to take action ", and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing; this is in marked contrast to the statutory provisions of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him". In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Before that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an inquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry ".

The above passage quite clearly explains that the point on which their Lordships of the Judicial Committee agreed with the majority of the Federal Court is that a further opportunity is to be given to the government servant after the charges have been established against him and a particular punishment is proposed to be meted out to him. The opening sentence in the above passage, namely, that section 240 (3) was not a reproduction of rule 55 and that rule 55 was left unaffected as an administrative rule does seem to suggest that section 240 (3) is not at all concerned with the enquiry into the charges which comes at the earlier stage, but a close reading of the rest of that passage will indicate that in their Lordships view the substance of the protection of rule 55 is also included in section 240 (3) and to that is superadded, by way of further protection, the necessity of giving yet another opportunity to the government servant at the stage where the charges are proved against him and a particular punishment is tentatively proposed to be inflicted on him. Their Lordships referred to " statutory opportunity being reasonably afforded at more than one stage," that is to say, that the opportunities at more stages than one are comprised within the opportunity contemplated by the statute itself. Of course if the government servant has been through the enquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, which implies that if no enquiry has been held under rule 55 or any analogous rule applicable to the particular servant then it will be quite reasonable for him to ask for an enquiry. Therefore, in a case where there is no rule like rule 55 the necessity of an enquiry was implicit in section 240(3) and is so in Article 311 (2) itself. Further their Lordships say that an enquiry under rule 55

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1. (1948) 2 M.L.J. 55: L.R. 75 I.A. 225: 1948 F.C.R. 44 (P.C.).

"would not exhaust his statutory right and he would still be entitled to make a representation against the punishment proposed as the result of the findings of the enquiry".

This clearly proceeds on the basis that the right to defend himself in the enquiry and the right to make representation against the proposed punishment are all parts of his "statutory right" and are implicit in the reasonable opportunity provided by the statute itself for the protection of the government servant.

The learned Solicitor-General appearing for the Union of India, then, contends that assuming that the government servant is entitled to have an opportunity not only to show cause against his guilt, but also an opportunity to show cause against the punishment proposed to be inflicted on him, the appellant in the present case has had both such opportunities, for by the notice served on him on July 9, 1949, the appellant was called upon to show cause against the charges as well as against the punishment of dismissal in case the charges were established. He points out that in *I. M. Lall's case*[1], the notice given to I. M. Lall did not specify dismissal as the only and particular punishment proposed to be imposed on him, but called upon him to show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority might think fit to enforce, whereas in the present case the notice referred to above clearly indicated that the punishment of dismissal alone was proposed to be inflicted. The learned Solicitor-General in support of his contention relies on the observations of the majority of the Federal Court quoted above and in particular on the passage where their Lordships stated:

"that in some cases it would be quite sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced in rank if all or any of the charges are proved dismissal or reduction in rank would follow and that this would be sufficient in some cases."

He also strongly relies on the circumstance that their Lordships of the Judicial Committee, after quoting the above passage, stated that they agreed with the view taken by the majority of the Federal Court. But as we have already explained, the other observations of their Lordships of the Judicial Committee, which follow immediately, quite clearly indicate that what they agreed with was that a second opportunity was to be given to the Government servant concerned after the charges had been brought home to him as a result of the enquiry. Their Lordships made it clear that no action could, in their view, be said to be proposed within the meaning of the section until a definite conclusion had been come to on the charges and the actual punishment to follow was provisionally determined on, for before that stage the charges remained unproved and the suggested punishments were merely hypothetical and that it was on that stage being reached that the statute gave the civil servant the opportunity for which sub-section (3) made provision. A close perusal of the judgment of the Judicial Committee in *I. M. Lall's case*[1] will, however, show that the decision in that case did not proceed on the ground that an opportunity had not been given to I. M. Lall against the proposed punishment merely because in the notice several punishments were included, but the decision proceeded really on the ground that this opportunity should have been given after a stage had been reached where the charges had been established and the competent authority had applied its mind to the gravity or otherwise of the proved charges tentatively and proposed a particular punishment. There is as the Solicitor-General fairly concedes, no practical difficulty in following this procedure of giving two notices at the two stages. This procedure also has the merit of giving some assurance to the officer concerned that the competent authority maintains an open mind with regard to him. If the competent authority were to determine, before the charges were proved, that a particular punishment would be meted out to the government servant concerned, the latter may well feel that the competent authority had formed an opinion against him, generally on the subject-matter of the charge or, at any rate, as regards the punishment itself. Considered from this aspect also the construction

1. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 : 1948 F.C.R. 44 (P.C.).

adopted by us appears to be consonant with the fundamental principle of jurisprudence that justice must not only be done but must also be seen to have been done.

It is on the facts quite clear that when Shri J. B. Tandon concluded his enquiry and definitely found the appellant guilty of practically all the charges he for the first time suggested that the punishment of dismissal should be the proper form of punishment in this case. Shri J. B. Tandon was not, however, the competent authority to dismiss the appellant and, therefore, he could only make a report to the Deputy Commissioner who was the person competent to dismiss the appellant. When the Deputy Commissioner accepted the report and confirmed the opinion that the punishment of dismissal should be inflicted on the appellant, it was on that stage being reached that the appellant was entitled to have a further opportunity given to him to show cause why that particular punishment should not be inflicted on him. There is, therefore, no getting away from the fact that Article 311 (2) has not been fully complied with and the appellant has not had the benefit of all the constitutional protection and accordingly his dismissal cannot be supported. We, therefore, accept this appeal and set aside the order of the single Judge and decree the appellant's suit by making a declaration that the order of dismissal passed by the Deputy Commissioner on December 17, 1951, purporting to dismiss the appellant from service was inoperative and that the appellant was a member of the service at the date of the institution of the suit out of which this appeal has arisen. The appellant will get costs throughout in all Courts. He must pay all court-fees that may be due from him. Under Order 14, rule 7 of the Supreme Court Rules, we direct that the appellant's counsel be paid his fees which we assess at Rs. 250.

Appeal allowed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S.K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

M. P. V. Sundararamier & Co. and others .. *Petitioners**

v.

State of Andhra Pradesh and another .. *Respondents.*

Attorney-General for India and others .. *Interveners.*

Madras General Sales-tax Act (IV of 1939) (as adapted in Andhra), section 22—If imposes a tax on sales falling under Article 286 (1) (a) of the Constitution of India (1950)—If void as contravening Article 286 (2) of the Constitution—If protected by Sales-tax Validation Act (Central Act, VII of 1956)—Proceedings taken under competency of.

Sales-tax Laws Validation Act (VII of 1956)—Constitutional validity—Whether validates only collections and leviesmade during the period prescribed—Whether autherises the imposition and collection of taxes on future sales also.

The Petitioners' contentions were :—

1. The Madras General Sales-tax Act (IV of 1939) (as adapted in Andhra) does not, in fact, impose a tax on 'Explanation sales' and in consequence the Sales-tax Laws Validation Act (VII of 1956) can have no effect.

2. The Central Act VII of 1956 is itself unconstitutional and void ; that even if valid does no validate section 22 of Madras Act IV of 1939 (as adapted in Andhra) ; that it validates only leviet and collection already made and does not authorise the initiation of fresh proceedings for assessments or for realisation of the same ; that even if it authorised fresh imposition, that could not be done without further legislation by the State and no action can be taken on the basis of section 22 of the Andhra (Madras) Act as it was *non est* for it was unconstitutional when enacted.

Held (by MAJORITY) :—Section 22 of the Madras General Sales-tax Act (IV of 1939)—inserted by the Adaptation Order of the President of India—though a copy of Article 286 (1) (*a*) of the Constitution has to be interpreted as a 'taxing statute' ; the observations in the *Bengal Immunity Company Case*, (1955) S.C.J. 671 : (1955) 2 M.L.J. (S.C.) 168 : (1955) An.W.R. (S.C.) 422 : (1955)

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* Petitions Nos. 220, 222, 240 and 380 to 395 of 1955. 11th March, 1958.

S.C.R. 603 at 640, would be inapposite. In its context and setting, the '*Explanation*' to section 22 must mean that it authorises the State of Andhra (Madras) to impose a tax on sales falling under its purview (Explanation sales). While in the context of Article 286 (1) (*a*) the *Explanation* thereto could be construed as purely negative in character though positive in form cannot be so construed in its setting in section 22 of the Madras Act where it must have a positive content.

There is no force in the contention that the *nonobstante* clause in section 22 has only the effect of limiting the power to tax conferred by the charging section 3 read with section 3 (*h*) and not of adding to it. The *Explanation* lays down in clear and unambiguous terms that the 'Explanation sales' are to be deemed to have taken place inside the State in which the goods are delivered for consumption and so full effect has to be given to it and its operation cannot be cut down by the *non obstante* clause.

The opening words of the section are 'nothing contained in this Act' and it means that the section has to be read as controlling section 2 (*h*). Reading section 2 (*h*) with section 22 as defining what are sales taxable and what are not, the *Explanation* really means that sales in which goods are delivered for consumption in the State of Andhra (Madras) the property shall be deemed to have passed inside that State notwithstanding that under the Sale of Goods Act the property had passed outside the State. 'Explanation sales' really fall under section 2 (*h*) and are taxable. *Mettur Industries* v. *State of Madras*, (1957) 1 M.L.J. 356 and *Dial Das* v. *P. S. Talwalkar*, A.I.R. 1957 Bom. 71, approved.

Mathews v. *T. C. Board of Revenue*, A.I.R. 1957 T.C. 300; *Cochin Coal Company, Ltd.* v. *State of T.C.*, (1956) 7 S.T.C. 731 and *Govt. of Andhra* v. *Noony Govindarajulu*, (1957) 2 An.W.R. 79: 8 S.T.C. 297, overruled.

Section 22 enacts both parts of Article 286 (2), the restriction imposed therein and also the condition on which the restriction shall cease. On a proper construction its true scope is that it does impose a tax on 'Explanation sales' but the imposition is to take effect only when Parliament lifts the ban. The section is a piece of conditional legislation within the competence of the Madras Legislature.

The contention that section 22 was inserted by the President under the powers vested under Article 372 (2) to adapt the laws of the States and it was therefore bad as travelling beyond its terms is untenable; for that power is the legislative power of the State whose law is adapted and further the validity of adaptation is non-justiciable.

The Sales-tax Laws Validation Ordinance (III of 1956) was intended to remedy the effect (on the States) of the decision in the *Bengal Immunity Company Case*, (1955) S.C.J. 672 : (1957) 2 M.L.J. (S.C.) 168 : 1955 An.W.R. (S.C.) 422: (1955) 2 S.C.R. 603 and it was eventually replaced by Act VII of 1956). The policy behind the Act is obviously to declare the law as interpreted in *United Motors Case*, (1953) S.C.J. 373 : (1953) 2 M.L.J. 743: (1953) S.C.R. 1069, as the law governing the sales falling under the *Explanation* up to date of judgment in the *Bengal Immunity Company Case* and to give effect to the law as laid down in that decision for the sales effected subsequent thereto.

The true nature of a law has to be determined not on the label given to it in the Statute but by its substance. The effect of section 2 of the Sales-tax Laws Validation Act is merely to liberate the State Laws from the fetter placed on them by Article 286 (2) and to enable such laws to operate in their own terms. So considered it is within the scope of the authority conferred on Parliament by Article 286 (2) and is not *ultra vires*. It cannot be held to be bad on the ground that it is retrospective in operation (*The United Provinces* v. *Atiqa Begum*, (1946) 1 M.L.J. 426 : L.R 73 I.A. 59, referred to.). Section 22 of the Madras Act though not passed by the Madras Legislature is within the expression 'law of a State' in Article 286 (2) and of section 2 of Act VII of 1956 and is within the protection afforded by the Validation Act.

The true construction of section 2 of Act VII of 1956 is that the two clauses therein are as indicated by the conjunction distinct and independent in their operation and the laws of the States are kept in force in respect of sales which have taken place during the specified period and that proceedings in respect thereof for assessment are within the protection of the Act.

The contention that Parliament alone is competent (*Vide* Entry 42, List I) to enact laws in respect of inter-State trade and commerce and that included power to impose tax as inter-State sales, raised by Madura Mills Ltd., (Intervener), cannot be accepted.

(1) Entry 64 in List II is successor to Entry 48 in Government of India Act (1935) and it would be legitimate to construe it as including the tax on inter-state sales unless there is something repugnant to it in the Constitution and there is none such. (2) Under the scheme of the Entries in the Lists taxation is regarded as a distinct matter and is separately set out. (3) Art. 286 (2) proceeds on the basis that it is the States that have the power to enact laws imposing tax on inter-State sales. It is a fair inference to draw from these considerations that Entry 54 in List II, the States are competent to enact laws imposing tax on inter-State sales.

Per *Sarkar, J.* (dissenting) :—The opening words of the '*Explanation*' "for the purposes of clause (*a*) (i)" must mean for the purposes of explaining which sale is to be regarded as having taken place "outside the State of Andhra". The *Explanation* is only for this purpose. It can only be read as contemplating a State other than Andhra as the State 'inside which a sale shall be deemed to have taken place'. The *Explanation* does not authorise taxation of a sale under which goods are delivered in Andhra though property to them passed in Madras.

That the '*Explanation*' has any facet showing what would be a sale inside Andhra is not acceptable.

Petitions under Article 32 of the Constitution for the enforcement of Fundamental Rights.

K. S. Krishnaswami Iyengar, Senior Advocate (*N. Srinivasan* and *R. Ganapathy Iyer*, Advocates, with him), for Petitioners.

D. Narasa Raju, Advocate-General of Andhra Pradesh (*T. M. Sen*, Advocate, with him), for Respondents.

C. K. Daphtary, Solicitor-General of India (*G. N. Joshi* and *T. M. Sen*, Advocates, with him), for Intervener No. 1.

V. K. Thiruvenkatachari, Advocate-General, for the State of Madras (*B. R. Gopalakrishnan* and *T. M. Sen*, Advocates, with him), for Intervener No. 2.

G. C. Mathur and *C. P. Lal*, Advocates, for Intervener No. 3.

V. L. Narasimhamoorthy, Advocate and *J. B. Dadachanji* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Interveners Nos. 4 and 5.

N. A. Palkhiwala, Advocate and *J. B. Dadachanji* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Intervener No. 6.

K. V. Subramania Iyer, Senior Advocate (*D. N. Mukherjee* and *B. N. Ghosh*, Advocates, with him), for Intervener No. 7.

P. N. Bhagwati and *I. N. Shroff*, Advocates, for Intervener No. 8.

Mahabir Prasad, Advocate-General for the State of Bihar (*Rajeshwar Prasad* and *S. P. Varma*, Advocates, with him), for Intervener No. 9.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The petitioners are dealers carrying on business in the City of Madras in the sale and purchase of yarn, and they have filed the present applications under Article 32 of the Constitution for the issue of a writ of prohibition or other appropriate writ restraining the State of Andhra from taking proceedings for imposing tax on certain sales effected by them in favour of merchants who are residing or carrying on business in what is now the State of Andhra Pradesh, on the ground *inter alia*, that the said sales were made in the course of inter-State trade, and that no tax could be levied on them by reason of the prohibition contained in Article 286(2) of the Constitution.

The course of dealings between the parties resulting in the above sales has been set out in para. 5 in Petition No. 220 of 1955. It is therein stated that the dealers in Andhra would place orders for the purchase of yarn with the petitioners in Madras, that the contracts would be concluded at Madras, that the goods would be delivered ex-godown at Madras and would thereafter be despatched to the purchasers either by lorries or by rail as might be directed by them, that when the goods were sent by rail, the railway receipts would be taken either in the name of the consignees, and sent to them by post or in the name of the consignor and endorsed to the purchasers and delivered to them in Madras or sent to them by post endorsed in favour of a bank and the purchasers would take delivery of those receipts after payment to the bank. It is said that in all cases price of the goods was paid in Madras.

On the above allegations, it is manifest that the sales mentioned therein are not all of the same kind, and in point of law, the incidents attaching to them might be different. A consideration of the validity of the imposition with reference to the several classes of sales mentioned above would be wholly airy and pointless without a determination of the facts relating to them, which, however, have not been investigated. Counsel for the petitioners, however, concedes that the dispute in this proceedings is confined to the proposed imposition of tax, in so far as it relates to sales of the character mentioned in the *Explanation* to Article 286 (1) (*a*), that is to say, sales in which the property in the goods sold passed outside the State of Andhra but the goods themselves were actually delivered as a result of the sale for

consumption within that State. These sales have been referred to in the argument before us as " Explanation sales " and it will be convenient to adopt that expression in referring to them in this judgment.

It will be seen that the above sales would all of them have been intra-State, so long as the Andhra State formed part of the composite State of Madras, and questions of the character now agitated before us could not then have arisen. On September 14, 1953, Parliament enacted the Andhra State Act (XXX of 1953), whereby a separate State called the State of Andhra was constituted incorporating therein territories which had previously thereto formed part of the State of Madras, and this Act came into force on October 1, 1953. Under section 53 of the Andhra State Act, the laws in force in the territories in the Andhra State prior to its constitution are to continue to be in force even thereafter, and one of those laws is the Madras General Sales Tax Act (Madras Act IX of 1939), hereinafter referred to as the Madras Act. Section 54 of the Andhra State Act conferred on the Government a power to adapt laws for the purpose of facilitating the application of any law previously made, and in exercise of the power conferred by this section an Adaptation Order was passed on November 12, 1953, whereby the word " Andhra " was substituted for the word " Madras " in the Madras Act. We shall hereafter refer to the Madras Act as continued and applied in the State of Andhra as the Andhra (Madras) Act.

It will be convenient at this stage to refer to the relevant provisions of this Act. The preamble to the Act states that " it is expedient to provide for the levy of a general tax on the sale of goods in the State of Madras ". " Sale " is defined in section 2 (*h*) omitting what is not material, as meaning "every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration". Section 2 (*i*) defines "turnover" as " the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration ". Section 3 is the charging section and provides that every dealer shall pay for each year tax on his total turnover for such year. By the Madras General Sales Tax (Amendment) Act No. XXV of 1947, a new *Explanation* was added to the definition of " sale ", and it is as follows :

> *Explanation* 2 : " Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made—
>
> (*a*) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or
>
> (*b*) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

This amendment came into force on January 1, 1948.

In *Poppatlal Shah* v. *The State of Madras*[1], this Court had to consider the scope of the definition of " sale " in section 2 (*h*) and of *Explanation* 2, and it was therein held that though the power to tax a sale was really a power to tax a transaction of sale and a law imposing such tax would be competent if any of the ingredients of sale had taken place within the State, the Madras Act had, by its definition of " sale " in section 2 (*h*) prior to the enactment of *Explanation* 2, imposed a tax only when the property in the goods passed within the State, and that in respect of sales which had taken place prior to the amendment, the tax would be unauthorised if the property in the goods passed outside the State of Madras. It was also observed that after the amendment came into force, a tax on a sale which came within *Explanation* 2 would be valid. That was the position in law under the Madras Act prior to the enactment of the Constitution.

It is now necessary to refer to the changes effected in the law by the Constitution. Article 286, which is relevant for the present purpose, is as follows :

1. (1953) S.C.J. 369 : (1953) 1 M.L.J. 739 : 1953 S.C.R. 677.

286. (1) "No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation:—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

Article 372 (2) enacts that:

"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

In exercise of the power conferred by this provision, the President made Adaptation Orders with reference to the Sales Tax Laws of all the States, and as regards the Madras Act, he issued on July 2, 1952, the Fourth Amendment inserting a new section 22 in that Act. It runs as follows:

"Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place—

(*a*) (i) outside the State of Madras, or

(ii) in the course of import of the goods into the territory of India or of the export of the goods out of such territory, or

(*b*) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

Explanation:—For the purpose of Clause (*a*) (i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State".

It will be noticed that the *Explanation* to Article 286 (1) (*a*) is reproduced *verbatim* in section 22 of the Madras Act. The true meaning and scope of this *Explanation* came up for consideration before this Court in the *State of Bombay and another* v. *The United Motors (India) and others*[1]. Therein, it was held by a majority that though the sales falling within the *Explanation* would, in fact, be in the course of inter-State trade, they became, by reason of the fiction introduced therein, invested with the character of intra-State sales, and would be liable to be taxed by the State within which the goods were delivered for consumption. Acting on this judgment, the Board of Revenue (Commercial Taxes) Andhra State, issued a notification on July 13, 1954, calling upon dealers to submit returns of their turnover of sales in which goods were delivered in the Andhra State for consumption, and a copy thereof was sent to the Madras Yarn Merchants Association, of which the petitioners are members. The Association disputed the liability of the Madras dealers to pay any tax in respect of the sales to the Andhra dealers, and after some correspondence, the Andhra State finally issued on June 30, 1955, notices to the

1. (1953) 1 M.L.J. 743: (1953) S.C.J. 373: 1953 S.C.R. 1069.

petitioners to send their returns of turnover by July 15, 1955, failing which it was stated that assessments would be made on the best judgment basis, and that, further, the dealers would be liable to the penalties prescribed by the law. (*Vide* Annexure H to the petition). Thereupon, the petitioners have filed the present petitions challenging the validity of the demand made by the Andhra State on the ground *inter alia*, that the sales proposed to be taxed were inter-State sales, and that they were immune from taxation under Article 286 (2). These petitions were filed on various dates in July and August, 1955.

While they were pending, the question of the true scope of the *Explanation* to Article 286 (1) (*a*) came up again for consideration before this Court in the *Bengal Immunity Company Ltd.* v. *The State of Bihar and others*[1]. By its judgment, dated September 6, 1955, this Court held, again by a majority that the sales falling within the *Explanation* being inter-State in character, could not be taxed by reason of Article 286 (2), unless Parliament lifted the ban, that the *Explanation* to Article 286 (1) (*a*) controlled only that clause and did not limit the operation of Article 286(2), and that the law had not been correctly laid down in the *United Motors Case*[2]. On the decision in the *Bengal Immunity Company Case*[1], it cannot be doubted that the claim of the Andhra State to tax Explanation sales would be unconstitutional, and indeed, that was admitted by the State in a statement filed on October 21, 1955, wherein it was stated that having regard to the decision aforesaid, the petitions might be allowed but without costs. Before final orders were passed on the petitions however, the Sales-Tax Validation Ordinance No. III of 1956, was promulgated on January 30, 1956, and that was later replaced by the Sales-Tax Laws Validation Act (VII of 1956) and that came into force on March 21, 1956. Section 2 of this Act runs as follows :

"Notwithstanding any judgment, decree or order of any Court no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951 and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law."

On February 19, 1957, the Andhra State which had become the State of Andhra Pradesh under section 3 (1) of the States Reorganisation Act (XXXVII of 1956) filed a fresh statement that by reason of the Validation Act the State was entitled to impose a tax on the Explanation sales, which had taken place during the period between the 1st day of April, 1951, and the 6th day of September, 1955, which will hereinafter be referred to as the specified period, and that the petitions should therefore be dismissed.

The petitioners challenge the correctness of this position. They contend that the Andhra (Madras) Act does not, in fact, impose a tax on the Explanation sales, and that, in consequence, the Validation Act can have no effect on it; that the Validation Act is itself unconstitutional and void; that the Act even if valid, does not validate section 22 of the Andhra (Madras) Act: that it validates only levies and collections of tax already made, and does not authorise the initiation of fresh proceedings for assessment of tax or for realisation of the same; that even if the Act authorised fresh imposition of taxes, that could not be done without further legislation pursuant thereto by the State, and that no action could be taken on the basis of section 22 of the Andhra (Madras) Act, as, being unconstitutional when enacted, it was for all purposes *non est*; that tax on the sale of yarn could under the Act be levied only at a single point and the State of Madras having imposed a tax on the sale of goods now proposed to be taxed, the Andhra State could not impose a tax once again on the sale of the self-same goods, and that, further, the tax on yarn would, so far as the Andhra State is concerned, be bad as being hit by the Essential Commodities Act (LII of 1952), read with Article 286 (3).

1. (1955) 2 M.L.J. (S.C.) 168 : (1955) An.W.R. (S.C.) 422 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603.

2. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : 1953 S.C.R. 1069.

It must be mentioned that similar to the Adaptation Order which enacted section 22 in the Madras Act, there were Adaptation Orders by the President with reference to the Sales-Tax Laws in all the States, and provisions similar to section 22 were enacted therein. As any decision by this Court on the questions raised in the petitions must conclude similar questions under the laws of other States, those States applied for and obtained permission to intervene in these proceedings, and we have heard the Advocates-General of Madras, Uttar Pradesh and Bihar on the questions. As the main point for determination is the *vires* of the Sales-Tax Laws Validation Act (VII of 1956), which will hereafter be referred to as the impugned Act, the Union of India has intervened, and the learned Solicitor-General has addressed us on the questions relating to the validity of that Act. Certain assessee who are interested in the decision of the above questions also applied for and obtained permission to intervene, and they are the Mysore Spinning and Manufacturing Company, the Minerva Mills, Limited the Tata Iron and Steel Company, Limited and the Madura Mills Company Limited and counsel appearing for them have, in general supported the petitioners.

Counsel for the Madura Mills Company Limited, raised a further contention different from and inconsistent with the position taken by the petitioners and other interveners, and that is that under Entry 42 in List I of the Seventh Schedule to the Constitution, inter-State trade and commerce is the exclusive domain of the Union Legislature, that tax on inter-State sales is comprised therein, that the States have accordingly no power to tax such sales, and that Parliament is not competent to authorise them to impose such a tax, and that, accordingly, the impugned Act is wholly misconceived and inoperative.

On these contentions, the questions that arise for our determination are :

(I) Whether the Andhra (Madras) Act, in fact, imposes a tax on the class of sales falling within the *Explanation* to Article 286 (1) (*a*) ;

(II) Whether the impugned Act is *ultra vires* on the ground that it is not authorised by the terms of Article 286 (2) ;

(III) (*a*) Whether section 22 of the Andhra (Madras) Act is within the protection of the impugned Act, and

(*b*) Whether the impugned Act validates only levies and collections made during the specified period, or whether it authorises the imposition and collection of taxes on such sales in future ;

(IV) Whether section 22 of the Madras Act was null and void on the ground that it was in contravention of Article 286 (2), and whether the proceedings sought to be taken thereunder on the strength of the impugned Act are incompetent ;

(V) Whether tax on inter-State sales is within the exclusive competence of Parliament, and whether the impugned Act is, in consequence, bad as authorising the States to levy tax;

(VI) Whether the proposed imposition of tax is illegal on the ground that successive sales of yarn are subject under the law to be taxed at only one point, and as the State of Madras has already taxed the present sales, the State of Andhra cannot again levy a tax on them ; and

(VII) Whether the proposed imposition of tax on yarn by the Andhra State is hit by the Essential Commodities Act (LII of 1952) read with Article 286 (3) and is illegal ?

(I): The first question that falls to be determined is whether the Andhra (Madras) Act, in fact, imposes a tax on the Explanation sales. Only if it does that, would the further questions as to the *vires* and the operation of the impugned Act arise for consideration. We have already referred to the relevant provisions of the Madras Act and to the decision of this Court in *Poppatlal Shah* v. *State of Madras*[1], wherein it was held that under the definition of "sale" in section 2 (*h*) of that Act and apart from the *Explanations* to it which are not material for the present discussion, power had been taken by the Province of Madras to tax only sales in which property in the goods passed inside the state. It must, therefore, be taken that under the Act, as it stood prior to the Constitution, the State of Madras had no power to impose a tax on sales of the kind mentioned in the *Explanation* to Article 286 (1) (*a*). Now, the question is whether the Adaptation Order of the

1. (1953) 1 M.L.J. 739 : (1953) S.C.J. 369 : (1953) S.C.R. 677.

President (Fourth Amendment), dated July 2, 1952, has by the insertion of section 22 in the Madras Act, altered the position. The contention of the respondent is that it has, because it has bodily incorporated the *Explanation* to Article 286 (1) (*a*) in the section itself, and as under that *Explanation*, all sales falling within its ambit would be sales inside the State of Madras, they became taxable as sales within the definition in section 2 (*h*) of the Madras Act; and that accordingly under section 22 of the Andhra (Madras) Act the Explanation sales become taxable by the Andhra State as sales within that State.

The petitioners dispute this position, and contend that that is not the true effect of the *Explanation*, and that properly construed, it does not authorise the imposition of any tax which was not leviable under the provisions of the Act, prior to its enactment. It is argued that the object of Article 286 of the Constitution was merely to impose restrictions on the power which the States had under, Entry 54 in List II to enact laws imposing tax on sales, and that, in that context the true scope of the *Explanation* to Article 286 (1) (*a*) was that it merely took away from the State its powers to tax a sale in which the property passed inside it if the goods were actually delivered under the sale for consumption in another State and not to confer on the delivery State a power to tax such a sale, and that the Explanation in section 22 which is, word for word, a reproduction of the *Explanation* to Article 286 (1) (*a*) must be construed as having the same import. Reliance is placed in support of this contention on the following observations of this Court in the *Bengal Immunity Company Case*[1]:

"In clause (1) (*a*) the Constitution makers have placed a ban on the taxing power of the States with respect to sales or purchases which take place outside the State. If the matter had been left there the ban would have been imperfect, for the argument would have still remained as to where a particular sale or purchase took place. Does a sale or purchase take place at the place where the contract of sale is made, or where the property in the goods passes or where the goods are delivered? These questions are answered by the *Explanation*. That *Explanation* is for the purposes of sub-clause (*a*), *i.e.*, for the purpose of explaining which "sale or purchase is to be regarded as having taken place outside a State. By saying that a particular sale or purchase is to be deemed to take place in a particular State the *Explanation* only indicates that such sale or purchase has taken place outside all other States. The *Explanation* is neither an *Exception* nor a *Proviso* but only explains what is an outside sale referred to in sub-clause (*a*). This it does by creating a fiction. That fiction is only for the purposes of sub-clause (*a*) and cannot be extended to any other purpose. It should be limited to its avowed purpose. To say that this *Explanation* confers legislative power on what for the sake of brevity has been called the delivery State is to use it for a collateral purpose which is not permissible. Further, it is utterly illogical and untenable to say that Article 286 which was introduced in the Constitution to place *restrictions* on the legislative powers of the States, by a side wind, as it were, gave enlarged legislative powers to the State of delivery by an explanation sandwiched between two *restrictions*. This construction runs counter to the entire scheme of the Article and the *Explanation* and one may see no justification for imputing such indirect and oblique purpose to this Article".

Now, the contention of the petitioners is that these observations are decisive of the present controversy, because the same provision expressed in *ipsissima verba* cannot have one meaning in Article 286 (1) (*a*) and quite a different one in section 22 of the Madras Act; and on the construction put by this Court on the *Explanation* to Article 286(1) (*a*), the Explanation to section 22 of the Andhra (Madras) Act must be interpreted as prohibiting States other than Andhra from taxing sales under which goods are delivered for consumption outside those States, even though property passed inside them and not as authorising the State of Andhra to tax sales in which goods are delivered therein for consumption, even though property in the goods passed outside that State. It is argued that this conclusion is reinforced by the opening words of section 22, *viz.*, "Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods". The effect of this, it is said, is to impose a restriction on the power which the State previously possessed, of taxing sales coming within the definition in section 2 (*h*) and not to enlarge it. The decision in *Government of Andhra* v. *Nooney Govindarajulu*[2] is cited in support of these contentions.

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1. (1955) 2 M.L.J. (S.C.) 168 : (1955) An. W.R. (S.C.) 422 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603, 640.
2. (1957) 2 An. W.R. 79 : 8 S.T.C. 297.

The error in this argument lies in this that it focusses attention exclusively on the terms in which the *Explanations* are couched in Article 286 (1) (*a*) and in section 22 and completely overlooks the fundamental difference in the context and setting of these two enactments. The scope and purpose of Article 286 have been considered at length in the decisions of this Court in the *United Motors Case*[1] as also in the *Bengal Immunity Company Case*[2], and it is sufficient to briefly recapitulate them. Under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, the Provincial Legislature had the exclusive competence to enact a law imposing a tax on the sale of goods, and under section 99 (1), such a law could be made "for the Province or for any part thereof". In *Wallace Brothers and Co. Ltd.* v. *Income-tax Commissioner*[3], the question arose as to the validity of certain provisions of the Indian Income-tax Act, which sought to tax non-resident foreigners in respect of their foreign income. The Indian Legislature had under Entry 54 in List I of the Government of India Act power to enact laws imposing tax on income other than agricultural income, and under section 99(1) the law could be made "for the whole of British India or for any part thereof". It was held by the Privy Council that the requirements of section 99 were satisfied if there was sufficient territorial connection between the State imposing the tax and the person who was sought to be taxed, and the receipt of income by the assessee in British India furnished sufficient nexus to give validity to the legislation imposing tax on their foreign income. If this doctrine of nexus is applicable to laws imposing tax on sales—and it was applied by this Court to those laws in the *United Motors Case*[1] at page 1079 and in *Poppatlal Shah's Case*[4] at pages 682-683—(then it would be competent to the State to enact a law imposing a tax on sales not merely when the property in the goods passed within the State but even when it did not, if there was sufficient connection between the State and the transaction of sale, such as the presence of the goods in the State at the date of the agreement, as was held recently by this Court in *Tata Iron and Steel Co. Ltd.* v. *State of Bihar*[5]. In fact, acting on the nexus theory the Legislatures of the States enacted Sales Tax Laws adopting one or more of the nexi as the basis of taxation. This resulted in multiple taxation, as a consequence of which the free flow of commerce between the States became obstructed and the larger economic interests of the country suffered. It was to repair this mischief that the Constitution, while retaining the power in the States to tax sales under Entry 54 in List II sought to impose certain restrictions on that power in Article 286. One of those restrictions is contained in Article 286 (1) (*a*) which prohibits a State from taxing outside sales. The *Explanation* now under consideration is attached to this provision, and it is in this context, *viz.*, in its setting in an Article, the object of which was to impose fetters on the legislative powers of the States, that this Court observed that though positive in form, it was in substance negative in character, and that its true purpose was not to confer any fresh power of taxation on the State but to restrict the power which it previously had under Entry 54.

These considerations will clearly be inapposite in construing a taxing statute like the Madras Act, the object of which is primarily to confer power on the State to levy and collect tax. When we find in such a statute a provision containing a prohibition followed by an *Explanation* which is positive in its terms, the true interpretation to be put on it is that while the prohibition is intended to prevent taxation of outside sales on the basis of the nexus doctrine, the *Explanation* is intended to authorise taxation of sales falling within its purview, subject of course to the other provisions of the Constitution, such as Article 286 (2). It should be remembered that unlike the Constitution, the law of a State can speak only within its own territories. It cannot operate either to invest another State with a power which it does not possess, or divest it of a power which it does possess under the Consti-

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1. 1953 S.C.R. 1069 : (1953) 1 M.L.J. 743 : 1953 S.C.J. 373.
2. (1955) 2 S.C.R. 603 : 1955 S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) An. W.R. (S.C.) 422.
3. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 ; 1948 F.C.R. 1.
4. (1953) 1 M.L.J. 739 : 1953 S.C.J. 369 : (1953 S.C.R. 677.
5. Civil Appeals Nos. 412 and 413 of 1956 decided on 19th February, 1958.

tution. Its mandates can run only within its own borders. That being the position, what purposes would the *Explanation* serve in section 22 of the Madras Act, if it merely meant that when goods are delivered under a contract of sale for consumption in the State of Madras, the outside State in which property in the goods passes has no power to tax the sale? That is not the concern of the State of Madras, and indeed, the Legislature of Madras would be incompetent to enact such a law. In its context and setting, therefore, the *Explanation* to section 22 must mean that it authorises the State of Madras to impose a tax on sales falling within its purview. Thus, while in the context of Article 286 (1) (*a*) the *Explanation* thereto be construed as purely negative in character though positive in form, it cannot be so construed in its setting in section 22 of the Madras Act, where it must have a positive content.

Nor is there much force in the contention that the *non obstante* clause in section 22 has only the effect of substracting something from the power to tax conferred on the State by the charging section, section 3, read with section 2 (*h*) and not of adding to it. In *Aswini Kumar Ghosh and another* v. *Arabinda Bose and another*[1], it was observed by this Court that:

> "the enacting part of a statute must, where it is clear, be taken to control the *non obstante* clause where both cannot be read harmoniously".

Now, as the *Explanation* lays down in clear and unambiguous terms that the sales of the character mentioned therein are to be deemed to have taken place inside the State in which goods are delivered for consumption, full effect must be given to it, and its operation cannot be cut down by reference to the *non obstante* clause. It cannot be put against this construction that it renders the *non obstante* clause ineffective and useless. According to the definition in section 2 (*h*), a sale in which property passes inside the State of Madras will be liable to be taxed, even though the goods are delivered for consumption outside that State, but under the *Explanation* such a sale will be deemed to have taken place in the outside State in which goods are delivered for consumption, and therefore the State of Madras will have no power to tax it. The purpose which the *non obstante* clause serves is to render the *Explanation* effective against the definition in section 2 (*h*) and not to render in ineffective in its own sphere, as determined on its terms.

But it is contended that in order to reach this result it was necessary that the *Explanation* to section 22 should have been made a part of the definition of "sale" under section 2 (*h*) because under section 3, which is the charging section, it is the turnover of sales that is subject to tax, that sale for the purpose of that section is only what is defined as "sale" under section 2 (*h*), and that *Explanation* sales not having been brought within that definition no charge could be imposed thereon. The *Explanation* in section 22, it is argued, cannot override section 2 (*h*), and if its object was to confer on the State a power to tax sales falling within its ambit, that has not in fact, been achieved. It is pointed out by way of contrast that in the Sales Tax Laws of some other States, such as Bihar and Uttar Pradesh, the *Explanation* has been added to the definition of sale. Now, a contention tha what the Legislature intended to bring about it has failed to do by reason of defective draftsmanship is one which can only be accepted in the last resort, when there is no avenue left for escape from that conclusion. But that clearly is not the position here. Section 22 opens with the words "Nothing contained in this Act" and that means that that section is to be read as controlling, *inter alia*, the definition of sale in section 2 (*h*). Otherwise, sales in which property passes in Madras but delivery is outside that State would be taxable under section 2 (*h*) and under section 3, even though they are within the prohibition enacted in section 22. If the provisions of section 22 are effective for the purpose of limiting the operation of section 2 (*h*) we do not see any difficulty in construing the *Explanation* therein as equally effective for the purpose of enlarging it. Again, it is a rule of construction well-established that the several sections forming part of a statute should be read, unless there are compelling reasons contra, as constituting a single scheme and construed

1. (1952) S.C.J. 568 : 1953 S.C.R. 1, 24.

in such manner as would give effect to all of them. On this principle, section 2 (*h*) and section 22 must be read together as defining what are sales, which are taxable under the Act and what are not, and so read, the *Explanation* really means, that in sales in which goods are delivered for consumption in the State of Madras, the property therein shall be deemed to have passed inside that State, notwithstanding that it has, under the Sale of Goods Act, passed outside that State. On this construction, those sales will fall within the definition in section 2 (*h*) and will be taxable. The contention of the petitioners highly technical and based on the non-insertion of the *Explanation* in section 2 (*h*) must, in our opinion, be rejected as unsound.

It is next contended that the power of the President under Article 372 (2) is merely to bring the provisions of the State Laws into conformity with Article 286, and that having regard to the interpretation put on that Article in *The Bengal Immunity Company Case*[1], the *Explanation* in section 22 would be valid in so far as it prohibits the State of Madras from imposing a tax on sales in which goods are delivered outside Madras, though property therein passed inside that State, but that in so far as it makes taxable sales in which property passes outside the State of Madras but the goods themselves are delivered for consumption in Madras, it is much more than bringing the State law into conformity with Article 286, and is, in consequence, unauthorised and bad. It is argued that such a provision could be enacted by the Legislature of Madras, as was in fact, done by the Legislatures of many of the States, but the President could not do it in exercise of the special and limited power conferred on him by Article 372 (2). That power is merely, it is contended, to take the definition of "sale" in section 2 (*h*) of the Madras Act, strike out therefrom whatever is repugnant to Article 286, such as sales in which goods are delivered for consumption outside Madras, and leave it there and not to add to it.

We are not satisfied that that is a correct view to take of the powers of the President under Article 372 (2). It is to be observed that Article 286 (1) (*a*) and the *Explanation* thereto form, in their setting in a taxing statute, integral parts of and different facets of the same concept. Sales in which property passes outside the State of Madras but delivery for consumption is inside Madras are at once inside sales for Madras and outside sales for the other States. Now, if in exercise of the power to adapt, the enactment of the *Explanation* is requisite to give effect to one aspect of that concept, that is, for prohibiting the State of Madras from taxing sales when goods are delivered outside, we fail to see why it should not operate to give effect to the other aspect of the concept which is so integrally connected with it, *viz.*, taxing of sales in which goods are delivered for consumption in the State of Madras, if its language is comprehensive and wide enough to include such sales. We find it difficult to hold that the self-same *Explanation* is *intra vires* the powers of the President in so far as it prohibits the State from taxing sales, in which goods are delivered outside the State but is *ultra vires* in so far as it authorises that State to tax sales in which goods are delivered inside it.

It should be remembered in this connection that the power which the President has under Article 372 (2) to adapt is the legislative power of the State whose law is adapted, and that includes the power to repeal and amend any provision. Provided that the law as adapted is within the legislative competence of the State and its enactment is in the process of bringing the State law into conformity with Article 286, it seems to us that it is within the ambit of the power conferred by Article 372(2). The question, however, is of academic interest, because of the concluding words of Article 372 (2), which enact that no Adaptation Order made under that provision shall be liable to be questioned. It was suggested for the petitioners that these words would have no application when the adaptation order went beyond the terms of Article 372 (2), and that it was open to them to challenge its validity on the ground that it amounted to more than bringing the existing law into conformity with Article 286. We are unable to agree. If the Adaptation Order is within the scope of Article

1. (1955) S.C.J. 672: (1955) 2 M.L.J. (S.C.) 8: (1955) An. W.R. (S.C.) 422: (1955) 2 S.C.R. 603.

372 (2), then it is valid of its own force, and does not require the aid of a clause such as is contained in the concluding portions thereof. It is only when the adaptation amounts to something more than merely bringing the State law into conformity with the constitutional provisions that there can arise a need for such a clause. In our opinion, the effect of the concluding words of Article 372 (2) is to render the question of the validity of the adaptation non-justiciable. The Adaptation Order in question must accordingly, be held to be not open to attack on the ground that it goes beyond the limits contemplated by Article 372 (2).

It is then argued that even though the Adaptation Order of the President might not be open to question even if it had imposed for the first time a tax on sales which had not been previously imposed by the Act, nevertheless in deciding whether it does, in fact, impose such a tax, it would be relevant to take into account that the object of Article 372 (2) was only to bring the State laws into conformity with the Constitution, and that, in consequence, the *Explanation* in section 22 must be construed as having the same meaning as the *Explanation* in Article 286 (1) (*a*). This would, no doubt, be a legitimate consideration in interpreting the language of the *Explanation*, but then , it must be remembered that at the time when the Adaptation Order was made, the true interpretation of the *Explanation* to Article 286 (1) (*a*) had not been the subject-matter of any decision, and it is therefore difficult to impute to the framers of section 22 the construction put by this Court on the *Explanation* to Article 286 (1) (*a*) in *The Bengal Immunity Company case*[1] any more than the one put on it in *The United Motors case*[2]. We are, therefore, thrown back on the language of the *Explanation* itself to discover its true scope. If, in enacting the *Explanation*, the Adaptation Order merely intended to prohibit the State of Madras from imposing tax on sales under which goods are delivered for consumption outside that State even though property therein passed inside that State, it would clearly have expressed that intention in words to the following effect:

> " For the purpose of clause (*a*) (i), a sale under which goods are delivered for consumption outside the State of Madras shall be deemed to have taken place outside that State, notwithstanding that property in those goods passed inside that State".

But the language of the *Explanation* is general, and fixes the situs of sales of an inter-State character in the State in which goods are actually delivered for consumption. Under this *Explanation*, a sale under which goods are delivered outside the State of Madras will be an outside sale for that State even though property in the goods passed inside that State, and likewise, a sale under which goods are delivered inside the State of Madras will be an inside sale for that State, even though property in the goods passed outside that State. As the language of the *Explanation* is general and of sufficient amplitude not merely to restrict but also to add to the power of the State to tax Explanation sales, and as the reasons for construing it as purely restrictive in Article 286 (1) (*a*) are, as already stated, without force in their application to a taxing statute, we must give full effect to the words of the enactment, and hold that they operate to confer on the State a power to tax Explanation sales.

There is one other contention relating to this aspect of the matter, which remains to be considered, and that is that even if the *Explanation* could be construed as authorising the imposition of a tax on the sales mentioned therein, a reading of the secton as a whole makes it clear that, in fact, no such tax was imposed, as it expressly enacts that "nothing contained in this Act shall be deemed to impose a tax on inter-State sales". The argument is that the Explanation sales being inter-State sales and the section having exempted them from taxation, they go out of the statute-book altogether, and do not exist for the purpose of the impugned Act. We are unable to agree with this contention. Article 286 (2) consists of two parts one imposing a restriction on the power possessed by the State to tax sales under Entry 54 in so far as such sales are in the course of inter-State trade and commerce and another, vesting

1. (1955) 2 M.L.J. (S.C.) 168 : (1955) An. W.R. (S.C.) 422: (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 (S.C.).

2. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : 1953 S.C.R. 1069 (S.C.).

in Parliament a power to enact a law removing that restriction. If section 22 had merely enacted that portion of Article 286 (2) which prohibited imposition of taxes on inter-State sales, that might have furnished some plausible ground for the contention now urged by the petitioners; but it enacts both the parts of Article 286 (2), the restriction imposed therein and also the condition on which that restriction is to cease, *viz.*, Parliament providing otherwise by law. Taken along with the admitted power of the States to impose tax on sales under Entry 54, the true scope of section 22 is that it does impose a tax on the Explanation sales, but the imposition is to take effect only when Parliament lifts the ban. In other words, it is a piece of legislation imposing tax *in praesenti* but with a condition annexed that it is to come into force *in futuro* as and when Parliament so provides. It is not contended that there is in the Constitution any inhibition against conditional legislation. In *The Queen* v. *Burah*[1], it was held by the Privy Council that a Legislature acting within the ambit of authority conferred on it by the Constitution has the power to enact a law either absolutely or conditionally, and that position has been repeatedly affirmed in this Court. *Vide* In re *The Delhi Laws Act*, 1912[2] and *Sardar Inder Singh* v. *State of Rajasthan*[3]. It would clearly be within the competence of the Madras Legislature to enact a law imposing a tax on sales conditional on the ban enacted in Article 286 (2) being lifted by Parliamentary legislation, and that, in our opinion, is all that has been done in section 22. The Madras Act defines the events on which the tax, becomes payable and the person from whom and the rate at which it has to be levied, and forms a complete code on the topic under consideration. It could have no immediate operation by reason of the bar imposed by Article 286 (2), but when once that is removed by a law of Parliament, there is no impediment to its being enforced. That satisfies all the requirements of a conditional legislation. But it was argued that section 22 of the Madras Act could not be so construed, because it was not open to the President acting in exercise of the power conferred on him under Article 372 (2) to impose a conditional levy ; nor would it be competent to the Legislature of Madras to make a levy conditional or otherwise, unless Parliament had authorised it. We see no force in this argument. As Article 286 (2) is itself in two parts, one a restriction on the power of the State and the other, a condition on which such restriction will cease to operate, an adaptation made pursuant thereto must also be similar in its contents. Nor is there in Article 286 (2) any prohibition of any legislation by the State Legislature against enacting laws imposing tax on inter-State sales. It merely enacts that such law can have no effect. The words "no law of a State shall impose" mean only that no such law shall be effective to impose a tax.

It is also contended that under the Sales Tax Acts, the levy of tax is annual and the rules contemplate submission of quarterly returns and payment of taxes every quarter on the admitted turnover, and that a conditional legislation under which payment of tax will become enforceable *in futuro* would be inconsistent with the scheme of the Act and the Rules. But this argument, when examined comes to no more than this that the existing rules do not provide a machinery for the levy and the collection of taxes which might become payable in future, when Parliament lifts the ban. Assuming that that is the true position, that does not affect the factum of the imposition, which is the only point with which we are now concerned. That the States will have to frame rules for realising the tax which becomes now payable is not a ground for holding that there is, in fact, no imposition of tax. It should also be mentioned in this connection that the Madras Act makes a clear distinction between sales which are outside the operation of the Act, and sales which are within its operation but are exempt from taxation. Section 4 provides that the provisions of the Act shall not apply to the sale of electrical energy, motor spirit, manufactured tobacco and certain other articles. In contrast to this is the language of section 22, which expressly enacts that the Act shall not be deemed to impose a tax on inter State sales, except in so far as Parliament may by law otherwise provide. We are of opinion that, on the true construction of section 22 of the Act, there is an imposition of tax on Explanation sales but that it could be enforced only when Parliament so provides.

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1. (1878) L.R. 5 I.A. 178.
2. 1951 S.C.R. 747 : (1951) S.C.J. 527.
3. (1957) S.C.J. 376.

We have so far considered the question on principle and on the language of the statute. We may now refer to the decisions of the High Courts, wherein this question has been considered. In *Mettur Industries Ltd.* v. *State of Madras*[1], the point directly arose for decision as to whether section 22 of the Madras Act did, in fact, levy a tax on the Explanation sales so as to fall within the protection of the Sales-Tax Laws Validation Act (VII of 1956). It was held that the *Explanation* to section 22 had the effect of rendering the sale one inside the State so as to fall within the definition of that word in section 2 (*h*), and that it was taxable. Next in point of time is the decision of the Bombay High Court in *Dial Das* v. *P.S. Talwalkar*[2], in which the question arose with reference to section 46 of the Bombay Sales-Tax Act (Bombay Act III of 1953), corresponding to section 22 of the Madras Act. It was held that it did impose a tax, though it was to operate only if Parliament so provided. Then, there are two decisions of the Travancore-Cochin High Court, *Mathew* v. *Travancore-Cochin Board of Revenue*[3], and *Cochin Coal Co., Ltd.* v. *State of Travancore-Cochin*[4], in which it was held that section 26 of the Travancore-Cochin General Sales-Tax Act corresponding to section 22 of the Madras Act, had not the effect of imposing, of its own force, a tax on the Explanation sales, and the decision in *Mettur Industries Ltd.* v. *Madras State*[1] was not followed. In *The Mysore Spinning & Manufacturing Co., Ltd.* v. *Deputy Commercial Tax Officer, Madras*[5], the Madras High Court re-affirmed the view which it had taken in *Mettur Industries Ltd.* v. *State of Madras*[1], and held that section 22 had the effect of imposing a tax on the Explanation sales. In *The Government of Andhra* v. *Nooney Govindarajulu*[6], the true effect of section 22 of the Madras Act came up for consideration before the Andhra High Court, and it was held therein, differing from *Mettur Industries Ltd.* v. *State of Madras*[1] and *Dial Das* v. *P. S. Talwalkar*[2], that in view of the observations of this Court as to the scope of the *Explanation* in Article 286 (1) (*a*), the *Explanation* in section 22 could not be construed as imposing a tax on the sales mentioned therein, and that that conclusion also followed on the opening words of the section that " nothing contained in this Act shall be deemed to impose, or authorise the imposition of a tax......" For the reasons already given, we are unable to agree with the decisions in *Mathew* v. *Travancore-Cochin Board of Revenue*[3], *Cochin Coal Co., Ltd.* v. *State of Travancore-Cochin*[4] and *The Government of Andhra* v. *Nooney Govindarajulu*[6]. We are of opinion that the law has been correctly laid down in *Mettur Industries Ltd.* v. *State of Madras*[1] and *Dial Das* v. *P.S. Talwalkar*[2]. We accordingly hold that section 22 operated to impose a tax falling within the *Explanation*, subject to authorisation by Parliament as provided in Article 286 (2). In this view, the contention urged on behalf of the States that the *Explanation* to Article 286 (1) (*a*) being a provision of the Constitution, operated by its own force to impose a tax on the sales covered by it, and did not require to be supplemented by any State legislation to become effective, does not call for any detailed consideration. Suffice it to say that it cannot be maintained if the true scope of Article 286 is to define and limit the powers of State Legislatures with reference to imposition of sales tax and not to itself impose it.

(II) That brings us on to the next question which is whether the impugned Act, Sales Tax Laws Validation Act, is *ultra vires* on the ground that it is not authorised by the terms of Article 286 (2). Now, it is a well-known rule of interpretation that in order to understand the true nature and scope of an Act it is necessary to ascertain what the evils were which were intended to be redressed by it. The starting point of the trouble which ultimately led to the enactment of the impugned Act is the *Explanation* to Article 286 (1) (*a*), which came into force on January 26, 1950. The terms in which it is worded undoubtedly suggest that sales of the description mentioned therein are to be treated as sales inside the delivery State for purposes of taxation. That is how it would seem to have been understood in the Adaptation Order under which section 22 was inserted in the Madras Sales Tax Act and in the Adaptation Orders relating to the Sales Tax Laws of other States for, as already

1. A.I.R. 1957 Mad. 362: (1957) 1 M.L.J. 356.
2. A.I.R. 1957 Bom. 71.
3. A.I.R. 1957 T.C. 300.
4. (1956) 7 S.T.C. 731.
5. A.I.R. 1957 Mad. 368 : (1957) 2 M.L.J. 167.
6. (1957) 2 An.W.R. 79 : 8 S.T.C. 297.

stated, in a taxing statute the language of the *Explanation* can only mean that a sale falling within its purview is an inside sale enabling the State to tax it. In *The United Motors case*[1], the construction put by this Court on the *Explanation* was that though but for it the sales mentioned therein would be in the course of inter-State trade and commerce, its effect was to convert them into inter-State sales, so as to bring them within the taxing power of the delivery State. It was only later that this Court held finally in *The Bengal Immunity Company case*[2] that the *Explanation* sales were not divested of their character as inter-State sales as the *Explanation* to Article 286 (1) (*a*) did not govern Article 286 (2), and that in the absence of Parliamentary legislation as contemplated by Article 286 (2), taxation of sales falling within its purview would be unconstitutional. This judgment was delivered on September 6, 1955.

But acting on the apparent tenor and import of the *Explanation* and the construction put upon it in *The United Motors case*[1], the States in India had been levying taxes on the sales falling within its purview. The position on September 6, 1955, was that the States had imposed and collected large amounts by way of tax on Explanation sales ; that there were proceedings pending for assessment of tax on such sales ; and that apart from this, the States would have been entitled to take, but for the decision in *The Bengal Immunity Company case*[2], proceedings for the assessment of tax in respect of those sales. Now, the result of the decision in *The Bengal Immunity Company case*[2] was that the levy of the tax on the Explanation sales became unauthorised and the States were faced with large claims for restitution of the amounts realised involving threat to their economic stability. It should also be mentioned that quite a large number of dealers had, acting under provisions of the Sales Tax Acts which empowered them to pass the tax on, collected it from their purchasers for the purpose of payment to the State, and as after the decision in *The Bengal Immunity Company case*[2] they could no longer be called upon to pay it, they stood to make an unjust gain of it.

These were the evils which called for redress, and it was to remedy them that Parliament enacted the Sales Tax Validation Ordinance No. III of 1956, and eventually replaced it by the impugned Act. Section 2 of the Act provides that no law of a State imposing a tax on sales which took place in the course of inter-State trade or commerce between April 1, 1951, and September 6, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sales were in the course of inter-State trade. The section further provides that all taxes levied or collected under such a law during the specified period shall be deemed to have been validly levied or collected. The policy behind the Act is obviously to declare the law as interpreted in *The United Motors case*[1] as the law governing sales falling within the *Explanation* up to the date of the judgment in *The Bengal Immunity Company case*[2] and to give effect to the law as laid down in that decision for the sales effected subsequent thereto.

The question is whether this Act is unconstitutional as being *ultra vires* the powers of Parliament under Article 286 (2). The petitioners maintain that it is, and put forward several grounds in support of that position. It is firstly contended by them that under Entry 54 in List II, the power to make laws in respect of tax on sales is vested exclusively in the States, that the power which is conferred on Parliament under Article 286 (2) is only to enact a law directing or permitting the States to impose a tax on inter-State sales and not to itself enact a law with reference thereto, that the impugned Act being one to validate Sales Tax Laws is substantive in character and is not authorised by the terms of Article 286 (2) and is, in consequence, unconstitutional. It is argued that to validate is to confirm or ratify, and that can be only in respect of acts which one could have himself performed, and that if Parliament cannot enact a law relating to sales tax, it cannot validate such a law either, and that

1. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : 1953 S.C.R. 1069.
2. (1955) 2 M.L.J. (S.C.) 168 : (1955) An. W.R. (S.C.) 422 : 1955 S.C.J. 672 : (1955) 2 S.C.R. 603 (S.C.).

such a law is accordingly unauthorised and void. The only basis for this contention in the Act is its description in the Short Title as the "Sales Tax Laws Validation Act" and the marginal note to section 2 which is similarly worded. But the true nature of a law has to be determined not on the label given to it in the statute but on its substance. Section 2 of the impugned Act which is the only substantive enactment therein makes no mention of any validation. It only provides that no law of a State imposing tax on sales shall be deemed to be invalid merely because such sales are in the course of inter-State trade or commerce. The effect of this provision is merely to liberate the State laws from the fetter placed on them by Article 286 (2) and to enable such laws to operate on their own terms. The true scope of the impugned Act is, to adopt the language of this Court in the decisions in *The United Motors case*[1] and *The Bengal Immunity Company case*[2] that it lifts the ban imposed on the States against taxing inter-State sales and not that it validates or ratifies any such law. Considering the legislation on its substance, we have no doubt that it is within the scope of the authority conferred on Parliament by Article 286 (2) and is not *ultra vires*.

It is next contended that the impugned Act is wholly retrospective in character in that it operates on sales which took place during the specified period and that such a legislation is, having regard to the intendment of Article 286 (2), outside its terms. It is argued that this Article, to start with, enacts a restriction on the power of the State to impose taxes on inter-State sales and then vests in Parliament a power to remove that restriction, and that in logical sequence therefore, there should first be a legislation by Parliament authorising the States to impose a tax on inter-State sales and then a law of the State made in accordance therewith, and that that order having been reversed in the present case, the impugned Act is unconstitutional. We do not agree with this contention. Article 286 (2) merely provides that no law of a State shall impose tax on inter-State sales "except in so far as Parliament may by law otherwise provide." It places no restrictions on the nature of the law to be passed by Parliament. On the other hand, the words "in so far as" clearly leave it to Parliament to decide on the form and nature of the law to be enacted by it. What is material to observe is that the power conferred on Parliament under Article 286 (2) is a legislative power, and such a power conferred on a Sovereign Legislature carries with it authority to enact a law either prospectively or retrospectively, unless there can be found in the Constitution itself a limitation on that power. Now, there is nothing express in Article 286 (2) imposing a restriction on the power of Parliament to enact a law with retrospective operation. But it is argued for the petitioners that such a restriction is to be implied from the scheme of it, which is that there is a prohibition on the power of the State to enact a law imposing tax on inter-State sales, unless Parliament lifts the ban, and it is said that a prohibition operates only *in futuro* and therefore a law removing that prohibition must also operate *in futuro*. The decision of the Privy Council in *Punjab Province* v. *Daulat Singh*[3], is relied on in support of this proposition. There, the question arose with reference to the validity of a mortgage of agricultural lands in the Punjab executed in the year 1933. Section 13-A of the Punjab Alienation of Land Act which came into force in 1939 enacted that transfer of a land by a member of an agricultural tribe in favour of another member of the tribe was void if the transferee was a benamidar for a person who was not a member of that tribe, whether such transfer was made before or after the Act. The mortgagee instituted a suit, challenging the *vires* of this section on the ground that it contravened section 298 (1) of the Government of India Act, 1935, which provided that no subject of His Majesty domiciled in India shall be prohibited from acquiring, holding or disposing of property on grounds only of religion, place of birth or descent. The mortgagor in reply relied on section 298 (2) which enacted that nothing in that section shall affect the operation of any law which prohibits the sale or mortgage of agricultural land situate in any particular area and owned by a person

1. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : (1953) S.C.R. 1069.
2. (1955) 2 M.L.J. (S.C.) 168 : (1955) An. W.R. (S.C.) 422 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 (S.C.).
3. (1946) 1 M.L.J. 426 : L.R. 73 I.A. 59 : (1946) F.C.R. 1.

belonging to the agriculturist class. In rejecting this contention, the Privy Council observed that what was saved by section 298 (2) was a law prohibiting certain kinds of transfers, that the word "prohibition" could properly apply only to acts to be done *in futuro*, and that the impugned provision, section 13-A, was *intra vires* the Constitutional provision in so far as it prohibited after the date of its enactment, but to the extent that it avoided transfers which had taken place prior to that date, it was *ultra vires*. This decision proceeded solely on the connotation of the word "prohibits" in section 298 (2) of the Government of India Act, and can be of no assistance in the construction of Article 286 (2), wherein that word does not occur. And even on the substance of it, we see no real analogy between the case in *Punjab Province* v. *Daulat Singh*[1] and the present. There, the law which was authorised section 298 (2) was one prohibiting certain transfers; here the law which Parliament is authorised to make is one not prohibiting the States from imposing tax on inter-State sales, but permitting them to do so. While a law prohibiting transfers must be prospective, a law authorising imposition of tax need not be. It can be both prospective and retrospective.

A decision more directly in point is the one in *The United Provinces* v. *Atiqua Begum*[2]. There, the question arose on the construction of section 292 of the Government of India Act, 1935, which enacted that:

> " Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority ".

The Legislature of the United Provinces had enacted a law modifying the pre-existing law relating to the payments of rents by tenants to landlords and giving it retrospective operation. The question was whether the enactment was repugnant to section 292 which had provided that the pre-existing law was to continue in force until it was altered. It was held that the power of a Legislature to pass a law included a power to pass it retrospectively, and that the words of section 292 did not operate to impose any restriction on that power, and that the legislation was *intra vires*. In our opinion, the principle of this decision is applicable to the present case, and the impugned Act cannot be held to be bad on the ground that it is retrospective in operation.

It is next contended that the impugned Act is *ultra vires*, inasmuch as it is much more than a mere retrospective law, and that it is really a piece of *ex post facto* legislation, which is not authorised by Article 286(2). The argument in support of this contention may thus be stated : A State Legislature is competent under Entry 54 in List II to enact a law taxing sale of goods, and when such a law is made to operate retrospectively it may not be open to challenge on Constitutional grounds, though its propriety may be open to question on grounds of policy. Parliament has no competence to enact laws in respect of tax on sales falling within Entry 54 in List II, but Article 286(2) confers on it a power to authorise the States to impose a tax on inter-State sales. The impugned Act does not do that, but validates *ex post facto* laws of States imposing such a tax retrospectively for the specified period. Such a general law may be *intra vires* the State but not Parliament nor is it one which can be justified by the power granted to it to " provide otherwise ". It is therefore unconstitutional and void. In our opinion, this argument is only an amalgam of the two contentions already dealt with, and does not require further detailed consideration. The impugned Act, though it is in name a validating Act, is in essence a law lifting the ban under Article 286 (2), and if no limitation on the character of that law could be spelt out of the language of that Article, then it must be upheld as within the authority conferred by it.

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1. (1946) 1 M.L.J. 426: L.R. 73 I.A. 59: (1946) F.C.R. 1.
2. (1940) F.C.R. 110: 1940 F.L.J. 97: (1941) 1 M.L.J. (Supp.). 65.

It is also argued that even if the power to make a law conferred on Parliament under Article 286 (2) comprehends a power to enact a law with retrospective operation, that power cannot extend to authorising what is unconstitutional, and that as section 22 of the Madras Act and the corresponding provisions in the statutes of other States were unconstitutional and illegal when made as contravening the prohibition enacted in Article 286 (2), the impugned Act must be held to be unauthorised and bad in that it seeks to give effect to those provisions. But this is to beg the very question which we have to decide. If it is competent to the legislatures of the States to enact a law imposing a tax on inter-State sales to take effect when Parliament so provides, there is nothing unconstitutional or illegal either in section 22 of the Madras Act or in the corresponding provisions in the Act of other States. If conditional legislation is valid, as we have held it is, then section 22 is clearly *intra vires*; and the foundation on which this contention of the petitioners rests, disappears and it must fall to the ground. In the result, we are of opinion that the impugned Act is *intra vires*, and is not open to challenge on any of the grounds put forward by the petitioners.

(III) (*a*) : We have now to consider the contention that even if the impugned Act is valid, that would not give efficacy to section 22 of the Madras Act or the corresponding provisions in the laws of other States which came in by adaptation under Article 372 (2). The ground urged in support of this contention is that the expression " law of a State " in Article 286 (2) has a technical import, and means a law which is enacted by the Legislature of a State in the manner prescribed by the Constitution and open to challenge in Courts if it is unconstitutional, that that expression occurring in section 2 of the impugned Act must bear the same meaning which it has in Article 286(2) as it was enacted pursuant to the authority contained therein, and that section 22 of the Madras Act is not a law of that description, as it was made by the President in exercise of the special power conferred on him by Article 372(2), and is, as provided therein, not open to attack in a Court of law.

We do not see why we should restrict the connotation of the words " law of a State " in the manner contended above. The law of a State signifies, in its ordinary acceptation, whatever is an expression of the legislative, as distinguished from the executive or judicial power of a State. Its normal mode under the Constitution is no doubt that it is enacted by the Legislature of the State constituted in accordance with the procedure prescribed therein. But that is not the only mode in which the legislative power of the State could be exercised. Under Article 213, the Governor is authorised, subject to the conditions laid down therein, to issue Ordinances which have the force of law, and these Ordinances are clearly laws of the State and not the less so by reason of their not having been passed by the State Legislature. Under Article 252, it is open to Parliament acting on resolutions of the Legislatures of two or more States, to enact laws on subjects which are within the exclusive competence of the States, a recent instance of such legislation being Act No. XLII of 1955, the validity of which was the subject of consideration in *R. M. D. Chamarbaugwalla* v. *Union of India*[1]. Can it be contended that these are not laws of the States for which they were enacted, because they were not passed by the Legislatures of those States ? We entertain no doubt that by the expression " law of a State " in Article 286(2) and section 2 of the impugned Act is meant whatever operates as law in the State, and that section 22 of the Madras Act is a law within those enactments. Nor does it affect this conclusion that that law may not be open to challenge in a Court of law. A right to challenge a law must depend on the provisions of the Constitution governing the matter, and if those provisions enact that it is not open to question in a Court of law or that it is liable to be questioned only on certain specified grounds, that will not have the effect of depriving a statute duly enacted of its character as law. We are also not satisfied that a law as adapted under Article 373(2) is not open to attack on the ground that it contravenes some Constitutional provision. We are disposed to think that the concluding words

1. (1957) 2 M.L.J. (S.C.) 76: (1957) 2 An. S.C.J. 593. W.R. (S.C.) 76: (1957) M.L.J. (Cr.) 547: (1957)

of Article 372(2) preclude an attack on the Adaptation Order only on the ground that it does more than merely bringing the State law into conformity with the Constitution and is, in consequence, *ultra vires* the powers conferred by that Article. In the result, we must hold that section 22 of the Madras Act is within the protection afforded by section 2 of the impugned Act.

(III) (*b*): The next contention of the petitioners that falls to be considered is whether even on the footing that the impugned Act is *intra vires* the powers of Parliament under Article 286(2), the proceedings which are proposed to be taken by the State of Andhra against them for assessment of tax are incompetent, because the Act validates only levies or collections made during the specified period but does not authorise the initiation of fresh proceedings for levy or collection of tax. It is contended that though section 2 of the impugned Act consists of two clauses, one giving effect to laws of States imposing tax on inter-State sales in so far as they took place during the specified period and the other validating levy or collection of tax made during that period, the first clause has no independent operation, the only purpose which it serves being to lead up to the second which is the only effective clause in the section. It is argued that if the intention of the Legislature was not merely to validate the levies or collections already made but also to maintain the laws in force so as to enable the States to take fresh proceedings for assessment and levy of tax, then there was no need whatsoever for the second clause, as effectuation of the Act would automatically validate the levies and collections made thereunder. It is said that the object of the legislation was only to see that the States had not to refund amounts collected by them, and that for achieving that object it was necessary only to give effect to the second clause. The decision in *Dialdas* v. *P. S. Talwalkar*[1], already cited, was relied on as supporting the petitioners on this point.

In our judgment, the language of the enactment is too clear and unambiguous to admit of this contention. If the purpose of the enactment is what the petitioners contend it to be, then nothing would have been easier for the Legislature than to have so framed the section as to confine its operation to levies or collections already made, without giving effect to the law itself. On the contention of the petitioners, the first clause has to be discarded as wholly inoperative, and we should be loth to adopt a construction which leads to that result. It is true that on the contention of the State that the first clause has independent operation the second clause would be unnecessary, as even without it, the result sought to be achieved by it must follow on the first clause itself. But it is to be noted that the first clause has reference to the exercise of legislative power while the second is concerned with administrative action, and it is possible that the second clause might have been enacted by way of abundant caution. It is nothing strange or unusual for a Legislature to insert a provision *ex abundanti cautela*, so as to disarm possible objection ; but it is inconceivable that it should enact a provision which is wholly inoperative. Of two alternative constructions of which one leads to the former and the other involves the latter result, there cannot be any question that it is the former that is to be preferred . Nor is it permissible to cut down the plain meaning of the terms of the statute on considerations of policy behind the legislation. But even from that point of view, there was the fact that there were dealers who had collected taxes from their purchasers for payment to the State, but were relieved of that obligation by the judgment in the *Bengal Immunity Case*,[2] and that, further, to validate only levies and collections made would give an advantage to those who evaded the law as then understood, over those who loyally obeyed it. It follows that we are unable to agree with the decision in *Dialdas* v. *P. S. Talwalkar*,[1] in so far as it held that it was not competent to the State to start fresh proceedings for

1. A.I.R. 1957 Bom. 71.
2. (1955) 2 M.L.J. (S.C.) 168: (1955) An.W. R. (S.C) 422: (1955) S.C.J. 672: (1955) 2 S.C.R. 603 (S.C.).

assessment of tax on the strength of the impugned Act. In our opinion, the true construction of section 2 is that the two clauses therein are, as indicated by the conjunction, distinct and independent in their operation, and that the laws of the States are kept in force in respect of sales which had taken place during the specified period, and that proceedings in respect thereof for assessment are within the protection of the Act.

It was next argued that the impugned Act is a temporary statute, as its operation is limited to sales which took place during the specified period, and that period having expired, no proceedings could now be taken on the strength of the provisions of that Act, and reliance was placed on the observations of this Court in *Keshavan Madhava Menon* v. *State of Bombay*[1], in support of this position. But the impugned Act is in no sense a temporary Act. Its life is not limited to any specified period. It is a permanent statute operating on all sales which took place during the specified period. The fallacy in this contention of the petitioners lies in mixing up the period, the sales during which are brought within the operation of the Act, with the period of the operation of the Act itself. The former may be said to be temporary, but the latter clearly is not.

(IV): It is next contended that even if the impugned Act authorised starting of fresh proceedings for assessment of tax on the Explanation sales which had taken place during the specified period, no action in that behalf could be taken under section 22 of the Andhra (Madras) Act, because it was, when it was enacted, repugnant to Article 286(2) of the Constitution, and was therefore void. It is argued that a statute which is unconstitutional is a nullity and must be treated as *non est* and that the impugned Act could not infuse life into it. It may be open, it is said, to the Legislature of the State of Andhra to enact a fresh law giving it even retrospective operation as provided in the impugned Act, but in the absence of such a legislation, the provisions of the Act as they stood prior to the impugned Act are incapable of enforcement. It would be sufficient answer to this contention that section 22 of the Madras Act is only a piece of conditional legislation, imposing tax on inter-State sales when Parliament should enact a law lifting the ban, and if such legislation is competent as we have held it is, then no question of unconstitutionality of the section when it was enacted could arise. But it would be more satisfactory to decide the point on its own merits as the question raised has been, of late, the subject of considerable discussion in this Court.

Now, in considering the question as to the effect of unconstitutionality of a statute, it is necessary to remember that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the Legislature, or because the matter itself being within its competence, its provisions offend some Constitutional restrictions. In a Federal Constitution where legislative powers are distributed between different bodies, the competence of the Legislature to enact a particular law must depend upon whether the topic of that legislation has been assigned by the Constitution Act to that Legislature. Thus, a law of the State on an Entry in List I, Schedule VII of the Constitution would be wholly incompetent and void. But the law may be on a topic within its competence, as for example, an Entry in List II, but it might infringe restrictions imposed by the Constitution on the character of the law to be passed, as for example, limitations enacted in Part III of the Constitution. Here also, the law to the extent of the repugnancy will be void. Thus, a legislation on a topic not within the competence of the Legislature and a legislation within its competence but violative of Constitutional limitations have both the same reckoning in a Court of law; they are both of them unenforceable. But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes? This question has been the subject of consideration in numerous decisions in the American Courts, and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the Legislature is a nullity, a law on a topic

1. (1951) 1 M.L.J. 370: (1951) S.C.J. 182: (1951) S.C.R. 228, 235.

within its competence but repugnant to the Constitutional prohibitions is only unenforceable. This distinction has a material bearing on the present discussion. If a law is on a field not within the domain of the Legislature, it is absolutely null and void, and a subsequent cession of that field to the Legislature will not have the effect of breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the Legislature but its provisions disregard Constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment.

Willoughby on the Constitution of the United States, Volume I, at page 11, says:

> "The validity of a statute is to be tested by the constitutional power of a Legislature at the time of its enactment by that Legislature, and, if thus tested it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted.
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> However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as for example, when a State Legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed".

In Cooley on Constitutional Law at page 201, it is stated that:

> "a finding of unconstitutionality does not destroy the statute but merely involves a refusal to enforce it".

In *Wilkerson* v. *Rahrer*[1], the State of Kansas had enacted a law in 1889 forbidding the sale of intoxicating liquor. This was bad in so far as it related to sales in the course of inter-State trade, as it was in contravention of the Commerce Clause. But in 1890, the Congress passed a law conferring authority on the States to enact prohibition laws. The question was whether a prosecution under the law of 1889 in respect of a breach of that law subsequent to the Congress legislation in 1890 was maintainable. Repelling the contention that the statute of 1889 was a nullity when it was passed and could not be enforced without re-enactment, the Court observed:

> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property."

It should be noted that in this case the law of 1889 applied to intra-State sales also, and it was admittedly valid to that extent. The impugned legislation was therefore unconstitutional only in part. Rottschafer after referring to the conflict of authorities on this question in the States, refers to the decision in *Wilkerson* v. *Rahrer*[1], as embodying the better view. *Vide* American Constitutional Law, 1939 Edition, page 39.

A similar view was taken in *Ulster Transport Authority* v. *James Brown and Sons Ltd.*[2] There, construing section 5(1) of the Act of 1920 which enacts that "any law made in contravention of the restrictions imposed by this sub-section shall so far as it contravenes these restrictions, be void", Lord Mac Dermott, L.C.J., observed:

> "I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorized text. As well as, this vertical severability, if I may so describe it, I see no reason why, if the circumstances warrant such a course, the terms of section 5 (1) should not be sufficiently met by what I may call a horizontal severance, a serverance that is which, without excising any of the text, removes from its ambit some particular subject-matter, activity or application. This, I think, would give effect to the words 'so far as it contravenes' without impinging on the meaning or weight to be attached to the word "void"."

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1. (1891) 140 U.S. 545; 35 L.Ed. 572.
2. (1953) Northern Ireland Reports 79.

It will be noted that this decision also deals with a statute which was in part unconstitutional.

Coming to the authorities of this Court where this question has been considered: In *Behram Khurshed Pesikaka* v. *The State of Bombay*[1], the question arose with reference to the Bombay Prohibition Act of 1949 which, subject to certain exceptions provided therein, prohibited the consumption of liquor. In the *State of Bombay and another* v. *F. N. Balsara*[2], this Court had held that this provision was obnoxious to Article 19(1) (*g*) of the Constitution in so far as it related to medicinal and toilet prepar tions containing alcohol. The appellant was prosecuted for the offence of consuming liquor, and his defence was that he had taken medicine containing alcohol. The point in dispute was whether the burden was upon the appellant to prove that he had taken such a medicine or for the prosecution to show that he had not. This Court held that the onus was on the prosecution, and the same not having been discharged, the appellant was entitled to be acquitted. In the course of the Judgment, Mahajan C.J., made the following observations, which are relied on by the petitioners:

> "The constitutional invalidity of a part of section 13 (*b*) of the Bombay Prohibition Act having been declared by this Court, that part of the section ceased to have any legal effect in judging cases of citizens and had to be regarded as null and void in determining whether a citizen was guilty of an offence".

It must be observed that the question of the constitutionality of the Act did not arise directly for determination and was incidentally discussed as bearing on the incidence of burden of proof. And further, these observations have reference to the enforceability of the provisions of the Bombay Prohibition Act, while the bar under Article 19 continued to operate. There was no question of the lifting of ban imposed by Article 19, and the question as to the effect of lifting of a ban did not arise for decision. In the context in which they occur, the words "null and void" cannot be construed as implying that the impugned law must be regarded as *non est* so as to be incapable of taking effect, when the bar is removed. They mean nothing more than that the Act in unenforceable by reason of the bar.

In *A. V. Fernandez* v. *State of Kerala*[3], the question arose with reference to the Travancore-Cochin General Sales Tax Act and the Rules made thereunder. Prior to the Constitution, the assessees were liable to pay tax on the total turnover of sales including those inside the State and those outside the State. Where the sales were of cocoanut oil, there was a provision for deduction of the price paid for the purchase of copra from the total turnover. After the coming into force of the Constitution, a new section, section 26, corresponding to section 22 of the Madras Act, was introduced incorporating therein the provisions of Article 286, and consequent thereon, the sales which took place outside the State were excluded from the turnover. On this, a question arose as to the quantum of deduction to which the assessee was entitled in respect of his purchase of copra. He claimed that he was entitled to deduct the price paid for copra not only in respect of oil which was sold inside the State but also oil sold outside the State. This contention was rejected by the High Court, which limited the deduction to purchase of copra relating to the sales inside the State, and in affirming that decision, this Court observed:

> "In our opinion, section 26 of the Act, in cases falling within the categories specified under Article 286 of the Constitution has the effect of setting at nought and of obliterating in regard thereto the provisions contained in the Act relating to the imposition of tax on the sale or purchase of such goods and in particular the provisions contained in the charging section and the provisions contained in Rule 20 (2) and other provisions which are incidental to the process of levying such tax. So far as sales falling within the categories specified in Article 286 of the Constitution and the corresponding section 26 of the Act are concerned, they are, as it were, taken out of the purview of the Act and no effect is to be given to those provisions which would otherwise have been applicable if section 26 had not been added to the Act."

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1. (1955) 1 M.L.J. (S.C.) 32: (1955) An. W.R. (S.C.) 32: (1955) S.C.J. 73: (1951) 1 S.C.R. 613, 654.
2. (1951) 2 M.L.J. 141: (1951) S.C.J. 478: (1951) S.C.R. 682.
3. (1957) 2 M.L.J. (S.C.) 129: (1957) 2 An.W.R. (S.C.) 129=1957 S.C.J. 689: A.I.R. 1957 S.C. 657 (663).

On the strength of the above observations, the petitioners contend that the provisions relating to inter-State sales must be treated as non-existent, and that, therefore, a fresh enactment of the statute would be necessary to bring them into operation. Here again, the point for decision was only as to the effect of the ban under Article 286 on the transactions which came within its purview. That ban had not then been lifted and the effect of the lifting of such a ban on the existing law did not fall to be considered. We are unable to read the observations relied on by the petitioners as implying that section 22 of the Madras Act must be taken to have been blotted out of the statute book.

A case directly in point is *Bhikaji Narayan Dhakras and others* v. *The State of Madhya Pradesh and another*[1]. There, the question arose with reference to the C.P. and Berar Motor Vehicles (Amendment) Act, 1947 (III of 1948). That Act had amended section 43 of the Motor Vehicles Act, 1939, by introducing provisions which authorised the Provincial Government

> " to take up the entire motor transport business in the Province and run it in competition with and even to the exclusion of motor transport operators ".

These provisions, though valid at the time when they were enacted, became void on the coming into force of the Constitution as infringing the rights of citizens to carry on business, protected by Article 19 (1) (*g*). The Constitution, however, was amended on June 18, 1951 and Article 19 (6) was amended so as to authorise the State to carry on business "to the exclusion complete or partial, of citizens or otherwise." Subsequent to this amendment, the Government issued a notification under section 43 of the Amendment Act of 1948, and it was the validity of that notification that was in issue. The contention was that as section 43 of the Act of 1948 had become void at the date of the Constitution, a notification issued by the Government under that section after the date of the amendment of the Constitution was not valid, as it must be taken to have become *non est*. It was held by this Court that section 43 of the Act of 1948 could not be held to have been effaced out of the statute book, because it continued to operate on transactions prior to the coming into force of the Constitution, and that even after the Constitution, it would be operative as against non-citizens, that the consequence of section 43 being repugnant to Article 19 (1) (*g*) was that it could not be enforced so long as the prohibition contained therein was in force, but that when once that prohibition had been removed as it was by the First Amendment, the provisions of that Act which had been dormant all the time became active and enforceable.

The result of the authorities may thus be summed up : Where an enactment is unconstiutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconsitutional will operate *proprio vigore* when the Constitutional bar is removed and there is no need for a fresh legislation to give effect thereto. On this view, the contention of the petitioners with reference to the *Explanation* in section 22 of the Madras Act must fail. That *Explanation* operates, as already stated, on two classes of transactions. It renders taxation of sales in which the property in the goods passes in Madras but delivery takes place outside Madras illegal on the ground that they are outside sales falling within Article 286 (1) (*a*). It also authorises the imposition of tax on the sales in which the property in the goods passes outside Madras but goods are delivered for consumption within Madras. It is valid in so far as it prohibits tax on outside sales, but invalid in so far as sales in which goods are delivered inside the State are concerned, because such sales are hit by Article 286 (2). The fact that it is invalid as to a part has not the effect of obliterating it out of the statute book, because it is valid as to a part and has to remain in the statute book for being enforced as to that part. The result of the enactment of the impugned Act is

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1. (1955) 2 S.C.R. 589 : (1956) S.C.J. 48.

to lift the ban under Article 286 (2), and the consequence of it is that that portion of the *Explanation* which relates to sales in which property passes outside Madras but the goods are delivered inside Madras and which was unenforceable before, became valid and enforceable. In this view, we do not feel called upon to express any opinion as to whether it would make any difference in the result if the impugned provision was unconstitutional in its entirety.

There is one other aspect of the question to which reference must be made. The decisions in *Behram Khurshed Pesikaka* v. *The State of Bombay*[1] and *Bhikaji Narayan Dhakras & others* v. *The State of Madhya Pradesh and another*[2] both turn on the construction of Article 13 of the Constitution, which enacts that laws shall be void to the extent they are repugnant to the provisions of Part III. We are concerned in these petitions not with infringement of any of the provisions of Part III but of Article 286 (2), and the point for our decision is as to the effect of the infringement of that provision. Article 286 (2) does not provide that a law which contravenes it is void and when regard is had to the context of that provision, it is difficult to draw the inference that that is the consequence of contravention of that provision. Article 372 (1) provides for the continuance in force of all laws existing at the date of the Constitution. The proviso to Article 286 (2) enacts that the President may by an order continue the operation of the Sales Tax Laws upto March 31, 1951, and Article 286 (2) itself enacts that no law of a State shall impose a tax. In the context in which they occur, the true meaning to be given to these words is, as already observed, that no law of a State shall be effective to impose a tax; that is to say, the law cannot be enforced in so far as it imposes such a tax. Whether we consider the question on broad principles as to the effect of unconstitutionality of a statute or on the language of Article 286 (2), the conclusion is inescapable that section 22 of the Madras Act and the corresponding provisions in the other statutes cannot be held to be null and void and *non est* by reason of their being repugnant to Article 286 (2) and the bar under that Article having been now removed, there is no legal impediment to effect being given to them.

(V): We shall now deal with the contention of the learned counsel for the Madura Mills Ltd., who struck a new path cutting across the lines on which the petitioners and the other interveners proceeded. He contended that the decisive factor in the determination of the question was Entry 42 in List I of the Seventh Schedule, "Inter-State trade and commerce", that under that Entry, Parliament had the exclusive power to enact laws in respect of inter-State trade and commerce and that included power to impose a tax on inter-State sales, that the States had therefore no competence under the Constitution to enact a law imposing tax on such sales, that the laws passed by the States after the Constitution imposing such a tax were *ultra vires* and void, that the impugned Act purporting to give effect to such laws was likewise *ultra vires* and inoperative, and that, in consequence, the proceedings sought to be taken under section 22 of the Madras Act and the corresponding provisions in the sister Acts of other States were unauthorised and illegal. The argument in support of this contention was as follows: Entry 42 in List I is based on the Commerce Clause of the American Constitution, Article 1, section 8 that

> "The Congress shall have power to regulate commerce among the several States",

and that has been interpreted by the Supreme Court of United States as meaning that the States have no power to enact a law imposing a tax on the carrying on of inter-State trade (vide *Robbins* v. *Taxing District of Shelby County*[3]) or imposing tax on inter-State sales. (Vide *McLeod* v. *Dilworth Co.*[4]) The contents of Entry 42 are the same as those of the Commerce Clause, and it must therefore be construed as of the same effect. It is also a well-established rule of construction that the Entries in the Legislative Lists must be interpreted liberally and in a wide sense. The true interpretation therefore to be put upon Entry 42 is that Parliament has, and therefore, in

1. (1955) 1 M.L.J. (S.C.) 32: (1955) An. W.R. (S.C.) 32: (1955) S.C.J. 73: (1955) 1 S.C.R. 613, 654.
2. (1955) 2 S.C.R. 589: (1956) S.C.J. 48.
3. 120 U.S. 489: (1887) 30 L.Ed. 694.
4. 322 U.S. 327: (1944) 88 L.Ed. 1304.

view of the *non obstante* clause in Article 246 (1) and of the words "subject to" in Article 246 (3), the States have not, the power to impose tax on inter-State sales. Article 301 which provides that trade and commerce in the territory of India shall be free is also intended to achieve the same result. It reproduces section 92 of the Commonwealth of Australia Act, and the authorities on that section have held that imposition of tax on inter-State trade would be obnoxious to that provision. That the freedom in Article 301 includes freedom from taxation is also implicit in Article 304 (*a*) in which an exception to Article 301 is made in respect of the imposition of tax on goods imported from other States. The result is, it is argued, that after the Constitution no law of a State can impose a tax on inter-State-sales, and in consequence, section 22 of the Madras Act, which came into force after the Constitution, would, if it is construed as imposing a tax, be bad, and the impugned Act which proceeds on the view that the States have the power to enact laws imposing a tax on inter-State sales and seeks to give effect to them would also be unconstitutional and void.

This contention suffers, in our opinion, from serious infirmities. It overlooks that our Constitution was not written on a tabula-rasa, that a Federal Constitution had been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built, and that the provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act. It fails to give due weight to the setting of the relevant provisions of the Constitution and the interpretation which is to be put upon them in their context. In the Government of India Act, 1935, there was no Entry corresponding to Entry 42 in List I of the Constitution. But there was in List II, Entry 48 which corresponds to Entry 54 in the Constitution. It is not in dispute that under Entry 48 the States had power to pass a law imposing a tax on inter-State sales, because the terms of the Entry are wide and would include inter-State as well as intra-State sales. It was on this view that the Provinces had enacted laws imposing tax on inter-State sales. Then the Constitution came into force, and it included for the first time a new Entry 42 in List I. It also reproduced Entry 48 in Entry 54 in List II in terms, for our purposes, identical. Having regard to the connotation of that Entry in the Government of India Act, 1935, one would have expected that if it was intended by the Constitution-makers that the States should be deprived of the power to tax inter-State sales which they had under Entry 48 in the Government of India Act, that would have been made clear in the Entry itself. It is material to note that while Entry 48 in the Government of India Act was "Taxes on the sale of goods and on advertisement", Entry 54 in List II of the Constitution as originally enacted was "Taxes on the sale or purchase of goods other than newspapers". Thus, the Constitution did limit the scope of Entry 48 by excluding from it newspapers, and if it was its intention to exclude inter-State sales from its purview, nothing would have been easier for it than to have said so, instead of leaving that result to be inferred on a construction of Entry 42 in List I in the light of the American authorities on the Commerce Clause. This is strong indication that Entry 42 is not to be read as including tax on inter-State sales. This conclusion is further strengthened, when regard is had to the scheme of the Lists in the Seventh Schedule and the principle underlying the enumeration of heads of legislation therein.

In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is "Railways," and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air ; taxes on railway fares and freights." If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers." If these expressions are to be interpreted as including duties to be levied in respect of

that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for Corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis—and it is not exhaustive of the Entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, Clauses (1) and (2) and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce.

Article 286 has a direct bearing on the point now under discussion. It imposes various restrictions on the power of the State to enact laws imposing taxes on sale of goods and one of those restrictions has reference to taxes on inter-State sales, *vide* Article 286 (2). It is implicit in this provision that it is the States that have got the power to impose a tax on such sales, as there can be no question of a restriction on what does not exist. That is how Article 286 (2) has been construed by this Court both in *The United Motors Case*[1] and in *The Bengal Immunity Company Case*[2]. It was observed therein that under Entry 54, as under Entry 48 of the Government of India Act, the power to tax sales rested with the States, and that Article 286 (2) was enacted with the object of avoiding multiple taxation of inter-State sales in exercise of the power conferred by that Entry. This again strongly supports the conclusion that Entry 54 must be interpreted as including the power to tax inter-State sales and Entry 42 as excluding it.

In order to get over this hurdle, learned counsel put forward the contention that Article 286 (2) had reference only to laws which were in existence at the time when the Constitution came into force, and that the power given to Parliament was one to continue those laws. Reference was made to the proviso to Article 286 (2) which authorised the President to direct that the taxes which were being levied by the State before the commencement of the Constitution might be continued to be levied until March 31, 1951, and it was said that the power conferred under Article 286 (2) was of the same character, and that it merely enabled Parliament to continue pre-Constitution laws :

Now, it cannot be disputed that the language of Article 286 (2) would, in terms. comprehend future legislation. Language similar to the one used in Article 286 (2) is also to be found in Article 287, and there, it clearly has reference to laws to be enacted after the Constitution. Indeed, it was conceded that on the wording of Article 286 (2) both existing and future legislation would be included. But it was contended that its operation should be limited to existing laws, because as Entry 42 in List I includes tax on inter-State sales, any law of the State subsequent to the Constitution imposing such a tax would be incompetent. This, however, is *petitio principii*. The point for decision is whether tax on inter-State sales is included within Entry 42. The inference to be drawn from the plain language of Article 286 (2) is that it is not. It is no answer to this to say that Entry 42 includes it, and that, therefore, the meaning of Article 286 (2) should be cut down. We cannot accede to such a contention.

To sum up : (1) Entry 54 is successor to Entry 48 in the Government of India Act, and it would be legitimate to construe it as including tax on inter-State sales,

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1. (1954) 1 M.L.J. 743: 1953 S.C.J. 373: (1953) S.C.R. 1069 (S.C.).
2. (1955) 2 M.L.J. (S.C.) 168: 1955 S.C.J. 672: (1955) An.W.R. (S.C.) 422: (1955) 2 S.C.R. 603 (S.C.).

unless there is anything repugnant to it in the Constitution, and there is none such. (2) Under the scheme of the Entries in the Lists, taxation is regarded as a distinct matter and is separately set out. (3) Article 286 (2) proceeds on the basis that it is the States that have the power to enact laws imposing tax on inter-State sales. It is a fair inference to draw from these considerations that under Entry 54 in List II the States are competent to enact laws imposing tax on inter-State sales.

We must now consider the arguments that have been put forward as supporting the opposite conclusion. It is firstly contended that the Entries in the Legislative Lists must be construed broadly and not narrowly or in a pedantic manner, and that, in accordance with this principle, Entry 42 should be construed, there being no limitation contained therein, as inclusive of the power to tax sales in inter-State trade and commerce. The rule of construction relied on is no doubt well-established; but the question is as to the application of that rule in the present case. The question here is not *simpliciter* whether a particular piece of legislation falls within an Entry or not. The point in dispute before us is whether between two Entries assigned to two different Legislatures the particular subject of legislation falls within the ambit of the one or the other. If Entry 42 in List I is to be constued liberally, so must Entry 54 in List II be, and the point is not settled by reference to Article 246, Clauses (1) and (3) and to the principle laid down in *Union Colliery Company of British Columbia* v. *Bryden*[1], that where there is a conflict of jurisdiction between a Central and a Provincial Legislature, it is the law of the Centre that must prevail. Article 246, Clauses (1) and (3) have to be invoked only if there is a conflict as to the scope of two Entries in the two Lists and not otherwise. What has therefore first to be decided is whether there is any conflict between Entry 42 in List I and Entry 54 in List II. If there is not, the application of the *non-obstante* clause in Article 246 (1) or of the words "subject to" in Article 246 (3) does not arise.

There is another rule of construction also well-settled that the Entries in two Legislative Lists must be construed if possible so as to avoid a conflict. In *Province of Madras* v. *Boddu Paidanna and Sons*[2], the question was as to whether the first sales by a manufacturer of goods were liable to be taxed by the Privince under Entry 48 in List II, or whether it was really a tax on excise which was within the exclusive competence of the Centre under Entry 45 in List I. It was held by the Federal Court that the correct approach to the question was to see whether it was possible to effect a reconciliation between the two Entries so as to avoid a conflict and overlapping, and that, in that view, though excise duty might in an extended sense cover the first sales by the manufacturer, in the context of entry 48 in List II it should be held not to include it, and that therefore the Province had the right to tax the first sales. This view was approved by the Privy Council in *Governor-General in Council* v. *Province of Madras*[3]. If it is possible therefore to construe Entry 42 as not including tax on inter-State sales, then on the principle enunciated in *Province of Madras* v. *Boddu Paidanna and Sons*[2] and *Governor-General in Council* v. *Province of Madras*[3] we should so construe it, as that will avoid a conflict between the two Entries.

It was also argued in support of the contention that Entry 42 in List I must be held to include the power to tax, that that was the interpretation put by the American authorities on the Commerce Clause, and that there was no reason why a different construction should be put on Entry 42 in List I of our Constitution. It is true that our Constitution-makers had before them the Commerce Clause and the authorities thereon. but it is a mistake to suppose that they intended to bodily transplant that clause in Entry 42. We had in the Government of India Act, 1935, a full-fledged Federal Constitution in force in this Country, and what the Constitution makers did was to draw from other Federal Constitutions of the world, adapt and modify the provisions so as to suit our conditions and fit them in our Constitution. In this new context, those provisions do not necessarily mean what they meant in their old set-

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1. L.R. (1899) A.C. 580.
2. (1942) F.L.J. 61 : (1942) 2 M.L.J. 327: (1942) F.C.R. 90.
3. (1945) L.R. 72 I.A. 91:(1945) F.C.R. 179: (1945) F.L.J. 69 : (1945) 1 M L.J. 225 (P.C.).

ting. The threads were no doubt taken from other Constitutions, but when they were woven into the fabric of our Constitution, their reach and their complexion underwent changes. Therefore, valuable as the American decisions are as showing how the question is dealt with in a sister Federal Constitution, great care should be taken in applying them in the interpretation of our Constitution. We should not forget that it is our Constitution that we are to interpret, and that interpretation must depend on the context and setting of the particular provision which has to be interpreted. Applying these principles and having regard to the features already set out, we must hold that Entry 42 in List I is not to be interpreted as including taxation. The same remarks apply to the argument based upon section 92 of the Commonwealth of Australia Act, 1900 and Article 301 of our Constitution. We should also add that Article 304(*a*) of the Constitution cannot be interpreted as throwing any light on the scope of Article 301 with reference to the question of taxation, as it merely reproduces section 297 (1) (*b*) of the Government of India Act, and as there was no provision therein corresponding to Article 301, section 297 (1) (*b*) could not have implied what is now sought to be inferred from Article 304 (*a*).

In the result, we are of opinion that if the States had the power under Entry 54 to impose a tax on inter-State sales subject only to the restriction enacted in Article 286 (2), then by virtue of the impugned Act such law is rendered operative and proceedings taken thereunder are valid. We have reached this conclusion on a construction of the statutory provisions bearing on the question without reference to the Sixth Amendment of the Constitution which, proceeding on the view that the States had the power to tax inter-State sales under Entry 54, has amended the Constitution, and has vested the power to tax inter-State sales in the Centre.

(VI) Another contention urged by the petitioners is that the levy of tax proposed to be made by the Andhra State on the sale of yarn by them to dealers in the State of Andhra is illegal, because under the Madras Act and the Rules made thereunder, where there are successive sales of yarn the tax can be imposed at only one point, and as the Government of Madras had already imposed a tax on the sale within that State, a second levy on the selfsame goods by the State of Andhra is unauthorised, and that therefore the threatened proceedings for assessment are incompetent. This contention is clearly untenable. When the Madras Act provides for a single levy on successive sales of yarn, it can have only application to sales in the State of Madras, as it would be incompetent to the Legislature of Madras to enact a law to operate in another State. But it is argued that section 53 of the Andhra State Act, 1953 on its true interpretation enacts that though for political purposes Andhra is to be regarded as a separate State, for the enforcement of laws as they stood on that date it should be deemed to be a part of the State of Madras. We do not agree with this interpretation. In our opinion, section 53 merly provides that the laws in existence in the territories which were constituted into the State of Andhra should continue to operate as before. In fact, by an Adaptation Order issued on November 12, 1953, even the name of Andhra was substituted for Madras in the Madras General Sales Tax Act. There is no substance in this contention.

(VII) Lastly, it is argued that the Essential Commodities Act (LII of 1952) enacted by Parliament in exercise of the power conferred by Article 286 (3) has declared that yarn is an essential commodity and that if the Madras Act is to be construed as a fresh enactment for the Andhra State by reason of sections 53 and 54 of the Andhra State Act and the Adaptation Order dated November 12, 1953, then it would be bad inasmuch as the procedure prescribed in that provision had not been followed. The basis of this contention is that the Madras Act as applied to the Andhra State is a new Act for purposes of Article 286 (3), but that is not so. The Madras Act was in force in the territories which now form part of the Andhra State until October 1, 1953, and therafter that Act continues to be in operation by force of section 53 of the Andhra State Act. Moreover, the Madras Act became operative in the new State of Andhra not under any law passed by the Legislature of the State of Andhra but under section 53 of a law enacted by Parliament and therefore Article

286 (3) has no application. We should add that the Essential Commodities Act (III of 1952) has itself been repealed and is no longer in operation. This contention of the petitioners also should be rejected.

The petitioners sought to raise certain other contentions such as that they are not "dealers" in the Andhra State, and that the *Explanation* to section 22 had no application to the sales sought to be taxed, as the goods were delivered not in the State of Andhra but in Madras. But these are questions which ought properly to be raised before the assessing authorities, and cannot be gone into in these proceedings.

In the result, the petitions fail and are rejected. The petitions have had a chequered career, their fortunes fluctuating with changes in the interpretation of the law and in the law itself. In the circumstances, we direct the parties to bear their own costs.

Sarkar, J.—The petitioners who are dealers in cotton yarn carrying on business in the city of Madras had sold goods to various persons in the State of Andhra. This State, the respondent in these petitions, demanded taxes on these sales under the provisions of the Sales Tax Act applying to its territories. The petitioners challenged the respondent's right to tax the sales, and filed these petitions for writs of prohibition or other suitable writs restraining the respondent from levying and collecting the tax. The Act mentioned various kinds of sales which could be taxed under it. The procedures followed by the petitioners in effecting the sales were diverse and have not yet been ascertained, and it is not possible without such ascertainment to decide whether they are or are not taxable under the provisions of the Act read with other relevant laws. To avoid this difficulty it has been agreed between the parties that the only question that will be decided on these petitions is whether the respondent can tax a sale under which the property in the goods sold passed outside the State of Andhra but the goods were delivered in that State for consumption there. Before proceeding to discuss this question it is necessary to refer to certain antecedent events.

On January 26, 1950, the Constitution of India was promulgated. It continued the laws previously in force in the territories of India subject to its provisions. Article 372 (2) of the Constitution provides that :

> "For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient."

Article 286 of the Constitution as it stood prior to its amendment in 1956, that being what this case is concerned with, contained the following provisions :

> "Art. 286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—
>
> (*a*) outside the State ; or
>
> (*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> *Explanation.*—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that state notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.
>
> (2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce."

In the year 1939 the Legislature of Madras had enacted the Madras General Sales Tax Act and this was continued in force by the Constitution after its promulgation. In order to bring its provisions into accord with the Constitution, the President under his power mentioned earlier, passed on July 2, 1952, the Adaptation of Laws (Fourth Amendment) Order which added a new section to the Madras Act.

being section 22. The terms of this section are important in this case and will be set out later.

The effect of the *Explanation* in Article 286 (1) (*a*) came up for consideration by this Court in the case of *The State of Bombay* v. *The United Motors (India) Ltd.*[1]. This Court held by its judgment pronounced by a majority, on March 30, 1953, that a State could tax a sale under which goods were delivered within its territories for consumption there though the property in the goods passed beyond its territories and a provision in a State statute purporting to levy such a tax did not contravene Article 286.

Andhra is a new State which came into existence on October 1, 1953. It was created by the Andhra State Act, 1953, largely out of territories previously belonging to the State of Madras. Later, the new State came to be designated as the State of Andhra Pradesh but I will refer to it as the State of Andhra or simply Andhra. Section 53 of the Andhra State Act provided that the laws in force prior to the Constitution of the State of Andhra in the territories included in it, were thereafter to continue in force there. The Madras General Sales Tax Act therefore became applicable to the State of Andhra and it became so applicable with the new section 22 previously added to it. Subsequently, the Madras Act as applying in the State of Andhra was, to suit the latter State, adapted by substituting for the name Madras the name Andhra wherever it occurred in that Act. I will hereafter call this Act the Sales Tax Act.

Sometime in the year 1954 the respondent, the State of Andhra, issued notices to the petitioners demanding taxes under its Sales Tax Act. As I have earlier stated the petitioners challenged the right of the respondent to levy the tax and certain correspondence followed. As the respondent insisted on collecting the tax, the petitioners instituted the present proceedings in July and August, 1955.

While these proceedings were pending, the question of the effect of Article 286 again came up for consideration by this Court in the case of the *Bengal Immunity Company Ltd.* v. *The State of Bihar*[2]. This Court by its judgment pronounced, again by a majority, on September 6, 1955 held that until Parliament by law made in the exercise of powers vested in it under Article 286 (2) otherwise provided, no State could impose any tax on a sale or purchase of goods when such sale or purchase took place in the course of inter-State trade or commerce and the majority decision in the *State of Bombay* v. *The United Motors (India) Ltd.*[1], in so far as it decided to the contrary could not be accepted and further that the *Explanation* in Article 286 (1) (*a*) did not confer any right on the State in which the goods were delivered under a sale, to tax it notwithstanding that the property in the goods passed in another State.

In view of this decision the respondent was advised that it could not oppose the petitions and on October 21, 1955 it actually filed statements in these proceedings submitting that the petitions might be allowed. Before however the petitions could be heard and disposed of, an Ordinance called the Sales Tax Laws Validation Ordinance, 1956 was promulgated by the President on January 30, 1956. This Ordinance was later on March 21, 1956, replaced by the Sales Tax Laws Validation Act, 1956. Both these enactments were in identical terms. The operative provision of the Validation Act is set out below :

> 2. "Notwithstanding any judgment, decree or order of any court no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951 and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce ; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law."

1. (1953) S.C.R. 1069 : (1953) S.C.J. 373: (1955) 2 M.L.J. (S.C.) 168: (1955) An. W.R. (1953) 1 M.L.J. 743. (S.C.) 422.
2. (1955) 2 S.C.R. 603 (1955) S.C.J. 672 :

The respondent was advised that the Validation Act had changed the situation and in view of it the petitions could no longer succeed. Thereupon, the respondent on February 19, 1957 filed fresh statements submitting that the petitions should be dismissed. The petitions have now come up for hearing in these circumstances.

The validity of the Validation Act itself has been challenged. But I do not think it necessary to decide that question. I will assume that that Act is perfectly valid. It does not however itself levy any tax. Its only effect, so far as these cases are concerned, is to permit the Sales Tax Act to operate to tax sales which took place in the course of trade between Andhra and any other State between certain dates. I will not refer to these dates hereafter for what I have to say applies to sales between them only. As has been agreed between the parties, as mentioned at the commencement of this judgment, the only question that we have to decide is whether a sale under which the goods were delivered in Andhra for consumption there though property in them passed in Madras, can be taxed by the respondent. Such a sale would no doubt be a sale in the course of trade between Andhra and Madras. It is said that such a sale cannot be taxed by the respondent notwithstanding the Validation Act, because the Sales Tax Act does not purport to tax it.

Does the Sales Tax Act then contain any provision taxing such a sale? Now the Act authorises the levy of a tax on sales as defined in it. A sale is defined in section 2 (*h*) of the Act. It is not disputed however that that definition does not include a sale under which goods are delivered in Andhra for consumption there but property in them passes in Madras and no further reference to that section is therefore necessary. It is however said that the effect of the *Explanation* in section 22 is to make such a sale, a sale within the meaning of the Act and therefore liable to be taxed under it. So I proceed to examine that section. Section 22 as it stood at the relevant time reads thus:

Section 22: "Nothing contained in this Act shall be deemed to impose, or authorise the imposition of, a tax on the sale or purchase of any goods, where such sale or purchase takes place

(*a*) (i) outside the State of Andhra, or

(ii) in the course of the import of the goods into the territory of India or of the export of the goods out of such territory; or

(*b*) except in so far as Parliament may by law otherwise provide, after the 31st day of March 1951 in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

Explanation.—For the purposes of clause (*a*) (i), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has by reason of such sale or purchase passed in another State."

Does the *Explanation* in this section then say that when under a sale goods are delivered in Andhra, the sale shall be deemed to have taken place there though the property in the goods may have passed in another State, for example, Madras? It no doubt says, without specifying any particular State, that a sale shall be deemed to have taken place in the State in which the goods were delivered under it though the property in them has passed in another State. But it seems to me impossible from the language used to say that it contemplated a case in which the goods were delivered in Andhra though property in them passed in another State. For the sake of clarity I have left out in what I have just said the term as to consumption in the State in which the goods were delivered and no question as to such consumption is in dispute in these cases.

The *Explanation* opens with the words "For the purposes of clause (*a*) (i)". What then is that clause? It only contains the words "outside the State of Andhra." It completes the sentence part of which has preceded it. The complete sentence says,

"Nothing in this Act shall be deemed to impose, or authorise the imposition of, a tax on the sale or purchase of any goods, where such sale or purchase takes place

(*a*) (i) outside the State of Andhra."

It then says that no tax shall be levied under the Act on a sale which takes place outside Andhra. It is after this that the *Explanation* comes and starts with the words " for the purposes of clause (*a*) (i) ". These words must therefore mean, for the purpose of explaining which sale is to be regarded as having taken place outside Andhra. The *Explanation* then is for this purpose. I will now turn to the remaining and the substantive portion of the *Explanation*. That must explain when a sale is to be regarded as having taken place outside Andhra. The substantive portion of the *Explanation* however mentions a sale which is to be deemed to have taken place inside a State. Keeping its purpose in mind, it must be taken by saying that a certain sale is to be deemed inside a State, to say that it is outside the State of Andhra. It follows that the *Explanation* does not contemplate that the State inside which a sale is to be deemed to have taken place, can be the State of Andhra. That State cannot be the State of Andhra, for then the *Explanation* would not show when a sale is to be deemed to be outside Andhra and that by its language is the only purpose for which it is enacted. Therefore the *Explanation* can only be read as contemplating a State other than Andhra as the State inside which a sale shall be deemed to have taken place. This is the inevitable result produced by the opening words of the *Explanation* understood according to their plain meaning. So the *Explanation*, omitting portions of it for the sake of clarity, can only be read in the manner shown below:

" For the purposes of clause (*a*) (i) a sale or purchase shall be deemed to have taken place in the State being a State other than Andhra, in which the goods have been actually delivered notwithstanding that the property in the goods has passed in the State of Andhra."

I therefore find it impossible to say that the *Explanation* states that a sale shall be deemed to have taken place inside Andhra if under it the goods have been delivered there though the property in them passed in another State. The *Explanation* does not hence, in my view, authorise the taxation of a sale under which goods are delivered in Andhra though property in them passed in Madras.

The view that I have taken of the purpose of the *Explanation* in section 22 was taken of the purpose of the *Explanation* in Article 286 (1) (*a*) in the *Bengal Immunity Company case*.[1] It was said at page 646 of the report,

" Here the avowed purpose of the *Explanation* is to explain what an outside sale referred to in sub-clause (*a*) is".

The language of the *Explanations* and the setting of each in its respective provision are identical. That language must therefore have the same meaning. It is said that the consideration that prevailed with the Court in the *Bengal Immunity Company case*[1] in dealing with Article 286 cannot apply in dealing with section 22 for the latter is a provision in a taxing statute which the former is not. But I do not see that this comment, even if justified, would lead to a different meaning being put on words used when they occur in a taxing statute from that when they occur in a statute which does not purport to levy a tax. As a matter of language only, words must have the same meaning. The words " for the purpose of clause (*a*) (i)" must therefore have the same meaning in the *Explanation* in Article 286 (1) (*a*) as in the *Explanation* in section 22. I am unable to distinguish the present case from the *Bengal Immunity Company case*[1] for the purpose of determining the meaning of the words used.

It is then said that the *Explanation* in section 22 has two facets; that when it talks of a sale inside one State, it at the same time necessarily talks of a sale outside all other States. Therefore it is said that when under a sale goods are delivered in Andhra but property in them passes outside Andhra, the *Explanation* at the same time makes such a sale inside Andhra and outside all other States. I do not follow this. Why should the *Explanation* in this Andhra Act be concerned with saying

1. (1955) 2 M.L.J. (S.C.) 168: (1955) An. W.R. (S.C.) 422: (1955) S.C.J. 672: (1955) 2 S.C.R. 603 (S.C.).

when a sale shall be deemed to have taken place outside all other States ? Andhra cannot of course legislate for any other State. Nor is there anything in this Act which makes it necessary for the purposes of it to say when a sale shall be deemed to be outside all other States. It follows therefore that a construction cannot be put on the language used in the *Explanation* which produces the result of showing a sale to be inside Andhra and so outside all other States. Further, as I have earlier pointed out, the words "For the purposes of clause (*a*) (i) with which the *Explanation* starts, show conclusively that it is necessarily confined to a sale under which goods are delivered in a State other than Andhra and the property in the goods passes in Andhra. It is no objection to this reading of the *Explanation* to say that the Andhra Act would then be saying when a sale is to be deemed to have taken place inside another State and it has no power to do so as it can legislate only for itself and for no other State. Such an objection would be pointless because Andhra by saying that a sale shall be deemed to have taken place inside another State is only legislating for itself and only saying that such a sale is therefore an outside sale so far as it is concerned and cannot be taxed in view of section 22 (*a*) of its Act. It may be that it is possible in construing the *Explanation* in Article 286 (1) (*a*) to conceive of two facets because that dealt with all States or any two States at a time and for all these the Constitution was fully competent to lay down the law. That however is not possible when construing a law passed by a State legislature. Such law cannot regulate the laws of other States. And in this case the conception is further impossible because the language shows that the *Explanation* is for explaining when a sale is to be deemed to have taken place outside the State of Andhra. It is not meant to explain when it is deemed to have taken place outside any State whatsoever that State may be. I am therefore unable to see that the *Explanation* has any facet showing what would be a sale inside Andhra.

The conclusion that I reach is that the Sales Tax Act with which these cases are concerned does not authorise the taxing of a sale under which goods are delivered in Andhra but the property in them passes in Madras. In this view of the matter I do not think it necessary to discuss the various other grounds on which the respondent's right to tax these sales was also challenged.

In the result I would allow these petitions.

ORDER OF THE COURT : In view of the opinion of the majority, the petitions are dismissed. The parties are to bear their own costs.

Petitions dismissed.

[END OF VOLUME (1958) I M.L.J.]

THE MADRAS LAW JOURNAL

(SUPPLEMENT).

I] JANUARY [1958

OUR FELICITATIONS

To

Hon'ble Sri K. Subba Rao, *Chief Justice, High Court of Andhra Pradesh, Hyderabad, and Judge-designate, Supreme Court of India.*

It is our privilege to offer our most respectful and cordial felicitations to Hon'ble Sri K. Subba Rao, our respected and beloved Chief Justice of Andhra Pradesh on his being summoned to fill the high office of a Judge of the Supreme Court of India. An Indian lawyer can look forward to no higher distinction than being invited to fill a place on the Bench of the highest Court of the land. That great distinction has come so deservedly to Sri Subba Rao.

Sri Subba Rao has had the advantage of working in the early years of his career at the Bar with that eminent lawyer and Judge Sri P. Venkatramanarao, and later in partnership with the illustrious Chief Justice of the Madras High Court, Sri P. V. Rajamannar. Pretty early in the profession His Lordship made his mark, and earned a reputation for a thorough mastery of the facts and the legal questions involved in the cases he handled. When he was appointed a Judge of the Madras High Court in 1948, at a comparatively young age, he was occupying a position of importance in the profession, and his elevation to the Bench was acclaimed as a fitting recognition of his ability and the position he had attained at the Bar.

As a puisne Judge of the Madras High Court in addition to deciding cases on the Appellate and Original side (both civil and criminal) he sat for several months to dispose of writ petitions. At that time the case-law relating to Article 226 of our Constitution was in its early stages, and it is no small tribute to his ability and quickness as a Judge to say that several hundreds of writ petitions involving difficult and diverse questions relating to the interpretation of our Constitution and various statutory enactments, were decided not only with ease, but also with the thoroughness of grasp of the scope of the jurisdiction vested in the High Court by Article 226.

In 1954 when the Andhra High Court was formed he was made to the satisfaction of all concerned, its first Chief Justice. It was the good fortune of the Andhra High Court that in the important years of its infancy it was presided over by a Chief Justice to whose unrelenting vigilance, and high judicial qualities, and administrative ability, so much of the success of the Court is due. That eminent Judge Sri Satyanarayana Rao referring to Sri Subba Rao as Chief Justice of the Andhra High Court observed : "It is a matter of real admiration to me that the Hon'ble the Chief Justice has been able to achieve so much for this Court in so short a time. Of course as a Judge I was aware of his merit, learning and experience but I never believed that he was capable of such administrative efficiency as to organise this Court in such a little time and run it on such sound lines".

His Lordship Sri Subba Rao, though leaving the Andhra Pradesh High Court, is going to adorn a still higher Court, and has many years of distinguished service before him. We do not propose to assess His Lordship's contributions to the several branches of law, except to say that during the ten years of his office as a Judge there is a record of judicial pronouncement of which any Judge can be proud.

We however take the liberty to refer to some of his outstanding qualities as Judge.

His Lordship has been in several respects a most satisfactory Judge. He has an innate dignity so essential to a Judge, and is endowed with quickness of grasp and a remarkable sense of relevancy. In hearing cases he not infrequently adopts the Socratic method of putting questions, and trying to test the correctness of submissions on fact and law by placing the contrary view. Even if sometimes such a method was slightly embarrassing to counsel, it must be admitted that in the result it added to a clearer and quicker disposal of the points in controversy.

No higher tribute could be paid to a Judge than to say that he served the cause of justice untrammelled by any intellectual predilections. There have been great Judges in the past of whom it was not infrequently said that their intellectual preferences were in a particular direction, and that they strained a point in favour of a widow fighting the reversioner, or a debtor squealing under the pressure of creditors. Such predilections were no doubt honourable and conceived in the interests of the weaker side, but perhaps from a higher standpoint they impinge on the immaculate freedom from prepossession that should characterise the highest judicial mind. But Sri Subba Rao is one of those Judges who followed the light of his own mind without any intellectual bias. That is why he held the scales scrupulously even between the State and the subject, the landlord and the tenant, the debtor and the creditor. In no case was his judicial apprehension deflected by a preconceived or an *a priori* theory of right and justice. Each case was given the decision it deserved.

Speaking on the occasion of the inauguration of the Andhra High Court His Lordship observed : "Judges should dedicate their lives to the cause of justice and bring to bear upon the cases that come before them an objective outlook and dispose of cases impartially, and to the best of their ability, uninfluenced by extraneous circumstances. My colleagues and I will do our utmost to steer the new Court through difficulties inherent in the progress of a new institution. It shall be our earnest endeavour to clear up arrears and dispense speedy but not hustled justice and to dispose of all matters not only in terms but in the spirit of the oath, the Governor has just now administered to us". In discharging the functions of his high office His Lordship showed a remarkable sense of duty and did his work literally in the spirit of the oath he had taken. And it is our firm hope and fervent prayer that His Lordship would, in the years to come, distinguish Himself still more, and add to the ever-increasing dignity and glory of the Supreme Court of the country.

We are very happy to note that His Lordship Mr. Justice Chandra Reddi has been made the Officiating Chief Justice. We have no doubt that this is a precursor to his being made the permanent Chief Justice, an office to which by his learning, experience, and high judicial qualities, if we may say so respectfully, he is eminently fitted.